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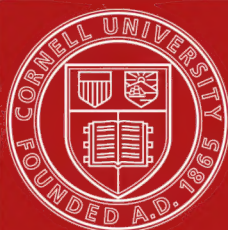
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Law and practice in accident cases ...



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LAW AND PRACTICE

IN

ACCIDENT CASES

INCLUDING

*A Statement of General Principles; Action, Parties Thereto;
Pleadings and Forms; Common Law and Code; Evidence
and Proof; Damages for Personal Injuries and for
Causing Death; Questions of Law and Fact;
Defenses; Contributory Negligence; Fellow
Servants; Requests to Charge and
Charges by Trial Judges.*

BY

CHARLES C. BLACK

AUTHOR OF "NEW JERSEY LAW OF TAXATION"

NEWARK, N. J.
SONEY & SAGE
1900

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PREFACE.

“Proof and Pleadings in Accident Cases” was a pioneer in the field then sought to be covered. The success of that book suggested the need of another one, on a somewhat similar plan, but with its scope enlarged and the limitations extended, and brought down to date, by a citation of the recent cases. The object in view, in the first book has been preserved in preparing “Law and Practice in Accident Cases,” viz.: A practice book, in distinction from those standard works on the law of negligence; a book for ready reference and use at the trial of cases; a book that will render assistance in bringing, maintaining and defending accident cases, in the courts. To give completeness to the plan of the book, the general principles underlying the law of negligence, have been stated in the first two chapters, with a citation of the leading cases and of the standard works on the subject of negligence. It is needless to say that there has been no attempt to cite all the reported negligence cases; but rather a selection of important cases. Both the common law and Code forms of pleadings have been added. Some charges in full, by trial judges, have been given for the purpose of showing, the precise application made by the courts, of the principles of negligence, to the trial of accident cases; as in no other branch of the law, is it so literally true as in the law of negligence, that it is one thing to understand a principle of law, and quite a different matter, to define it accurately and apply it correctly.

JERSEY CITY N. J., *January 1, 1900.*

C. C. B.

TO
THE MEMORY OF MY SISTER
ANNA
THIS BOOK IS INSCRIBED

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PRACTICE — EXCEPTIONS — REQUESTS TO CHARGE — CHARGES IN FULL BY TRIAL JUDGES.

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- Waite v. Northeastern Ry. Co. (El. B. & E. 719), 167.
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LAW AND PRACTICE IN ACCIDENT CASES.

PART I—GENERAL PRINCIPLES.

CHAPTER I.

GENERAL PRINCIPLES.

DEFINITIONS; DISTINCTIONS.

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| <p>§ 1. Accident and negligence distinguished.</p> <p>2. Negligence and torts distinguished.</p> <p>3. Negligence defined.</p> <p>4. Negligence is divisible into two classes — Scope of the book.</p> <p>5. Negligence is a negative and not a positive term.</p> <p>6. Negligence is a relative and not an absolute term.</p> <p>7. Negligence and fraud distinguished.</p> <p>8. Negligence and accident distinguished — Illustrations.</p> <p>9. Negligence, heedlessness, and willful mischief distinguished.</p> <p>10. Negligence and misfeasance distinguished.</p> <p>11. Nonfeasance, misfeasance, and malfeasance defined and distinguished.</p> <p>12. Negligence and nuisance distinguished.</p> <p>13. Invitation and license distinguished.</p> | <p>§ 14. Negligence is divisible into three degrees — Denied.</p> <p>15. Negligence is divisible into three degrees.</p> <p>16. Legal duty defined — Duty and right distinguished.</p> <p>17. A breach of legal duty is of the essence of negligence.</p> <p>18. A breach of legal duty must be shown—Burden of proof.</p> <p>19. Ordinary care, reasonable care, utmost care defined.</p> <p>20. Intent and design are not elements of negligence.</p> <p>21. Negligence—Proximate cause — Injury resulting from two causes.</p> <p>22. Violation of duty imposed by statute.</p> <p>23. Failure to comply with requirements of ordinances by railroad companies.</p> <p>24. Dangerous or illegal work done under contract.</p> <p>25. Federal and State courts — When not bound by each other's decisions.</p> <p>26. No contribution between joint tort-feasors.</p> |
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SECTION 1. Accident and negligence distinguished.—The word “accident” is used to designate an event or occurrence which

happens unexpectedly from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by a tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both.¹ An accident is the effect or result, which may or may not be caused by negligence; negligence is the cause;² when it is the proximate cause of an accident it is actionable; when an accident is caused by human agency which is unavoidable, or by an unknown cause, or by the uncontrollable operations of nature alone, it is not actionable. The courts speak of accidents thereby designating results or effects which may or may not be caused by actionable negligence.

§ 2. **Negligence and torts distinguished.**—Negligence from which personal injury or death of a human being results, is a branch of the law of torts. The word “tort” is derived from the Latin *tortus*, meaning twisted; a “tort,” in its original and most general sense, means any wrong;³ in a more restricted sense, however, a tort signifies an act which gives rise to a right of action, being a wrongful act causing injury and which consists in the infringement of a right, created otherwise than by a contract.⁴ The term “torts” includes wrongs, suffered “in consequence of the negligence or malfeasance of

¹ Butler, J., in *Morris v. Platt*, 32 Conn. 85 (1864).

² *McCarty v. New York &c. R. Co.*, 30 Pa. St. 251 (1858). See *Henry v. Grand Ave. Ry. Co.*, 113 Mo. 537 (1892), § 8.

³ *Rapalje & Law. Law Dict.* (vol. 2), p. 1280.

⁴ *Ib.* “We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly coincident as to make their practical separation

somewhat difficult. *Moak's Underhill on Torts*, 23. The text writers either avoid a definition entirely (*Addison on Torts*), or frame one plainly imperfect (2 *Bouvier's Law Dict.* 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes. *Cooley on Torts*, 3, note 1; *Moak's Underhill on Torts*, 4; 1 *Hilliard on Torts*, 1. By these last authors a tort is described in general as “a wrong independent of contract.” And yet it is conceded that a tort may grow out of, or make part of, or be coincident with a contract (2 *Bouvier's Law Dict.* 600), and that precisely the same state of facts, between the same parties, may admit of an ac-

others, where the remedy at common law is by an action on the case."⁵ Where a tort is committed upon a public navigable water of the United States, it is said to be a "marine tort."⁶ A tort is maritime where the injury is received upon a vessel afloat, though the negligence originated on land.⁷ The word "tort" is not synonymous with the word "negligence," all torts are not the result of negligence — some torts only, flow from negligent acts; nor on the other hand is negligence, in all cases, from which a right of action arises, a tort. It is a tort in those cases only where there is a violation of those duties imposed by law, as distinguished from the duties created by contract, resulting in injury; an action *ex contractu* as well as an action *ex delicto* may arise from negligence, while an action *ex delicto* only, will lie for a tort. While it is true that precisely the same state of facts, between the same parties, may admit of an action, either *ex contractu* or *ex delicto*,⁸ yet the contract is, in legal significance, distinct from the tort; the latter is sometimes called tortious negligence.⁹

tion either *ex contractu* or *ex delicto*.
Cooley on Torts, 90.

"In such cases the tort is dependent upon, while at the same time independent of, the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. 1 Addison on Torts, 13. Ordinarily, the essence of a tort consists in the violation of some duty to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal, or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the breach of contract. But where no such relation flows from the constituted facts, and still, a breach of its obligation is made the essential and principal means, in combination with other and perhaps inno-

cent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test." Finch, J., in *Rich v. New York &c. R. R. Co.*, 87 N. Y. 382, 390 (1882).

⁵ Grier, J., in *Philadelphia &c. R. R. Co. v. Philadelphia &c. Tow-boat Co.*, 23 How. (U. S.) 209, 216 (1859).

⁶ *Holmes v. Oregon &c. R. R. Co.*, 5 Fed. Rep. 75 (1880).

⁷ *Leonard v. Decker*, 22 Fed. Rep. 741 (1884).

⁸ *Rich v. New York &c. R. R. Co.*, 87 N. Y. 382, 390 (1882); Cooley on Torts, 90; Shearm. & Redf. on Neg. (5th ed.), § 22; *Stock v. City of Boston*, 149 Mass. 410 (1889).

⁹ Shearm. & Redf. on Neg., § 4. "Some difference of opinion exists on the question whether cer-

§ 3. **Negligence defined.**—Negligence is a species or subdivision of “torts,” and may exist either where the parties are strangers, or where they stand in a special relation one to the other.¹⁰ “Negligence in its civil relations is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as produces in an ordinary and natural sequence a damage to another.”¹¹ Baron Alderson’s definition is, “negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man

tain kinds of injuries, especially those arising from the negligence of carriers, are, or are not, torts, strictly speaking, *i. e.*, whether they are wrongs independent of contract, or breaches of contract sued for in the form of actions for tort.” Dicey on Parties, p. 377.

A general right of a citizen to security of life and limb, and indemnity against personal injuries occasioned by negligence, fraud or violence of others, is a right *in rem*, as distinguished from a right *in personam* growing out of contract. “These two kinds of right may exist in the same person at the same time, and though having no connection with each other, may look to the accomplishment of the same object; yet the possession of the one does not affect duties and obligations relating to the other.” Mulkey, J., in *Wabash &c. Ry. Co. v. Shacklett*, 105 Ill. 364, 380 (1883).

The rule in actions for breach of contract is, that the damages recoverable are only such as the parties may reasonably be supposed to have contemplated as likely to result from such a breach; the general rule in actions for torts is,

that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. *Brown v. Chicago &c. Ry. Co.*, 54 Wis. 342 (1882). See *Hadley v. Baxendale*, 9 Exch. 341 (1854); *Hobbs v. London &c. Ry. Co.*, L. R., 10 Q. B. 111 (1875).

So the rule in reference to parties to the action is different in the two kinds of actions. See chap. 3, Parties, § 90.

¹⁰ *Rapalje & Law. Law Dict.* (vol. 2), p. 858.

¹¹ *Whart. on Neg.*, § 3. Mr. Chief Justice Beasley, of the Supreme Court of New Jersey, approved Dr. Wharton’s definition as complete. *Salmon v. Delaware &c. R. R. Co.*, 9 Vr. 5, 11 (1875). *Shearman & Redfield’s* definition (§ 3 [5th ed.]), is “Negligence, constituting a cause of civil action, is such an omission, by a responsible person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended damage to the latter.”

would not do.”¹² Negligence may operate either to create or to defeat a right of action.

§ 4. Negligence is divisible into two classes — Scope of the book.

— Negligence is divisible into two classes; negligence arising from a contractual relation such as bailment for which an action *ex contractu* will lie; and negligence arising from a tort, *i. e.*, where the duty is created by law and the breach of it is called a “tort,” for which an action *ex delicto* is the proper remedy. It is the law of negligence viewed as a tort, the practice in actions brought to protect and enforce the rights growing out of accidents causing personal injuries and death of human beings, that limits the scope of this book. Including a statement of the general principles governing the law of accident cases: Actions — parties thereto, pleadings

¹² Blythe v. Birmingham Water Works, 11 Exch. 784 (1856). This definition is cited with approval by Mr. Justice Field in the Nitro-Glycerine Case, 15 Wall. 524, 538 (1872). “Negligence is the breach of legal duty.” Mitchell, J., in Osborne v. McMasters, 40 Minn. 105 (1889). For other definitions see Deering on Negligence, § 1; Cooley on Torts, 630; 7 Am. & Eng. Ency. of Law (2d ed.), p. 370; Ray on Negligence of Imposed Duties, § 183; McCully v. Clarke, 40 Pa. St. 402 (1861); Nicholson v. Erie Ry. Co., 41 N. Y. 525, 529 (1870); Tower v. Providence & C. R. R. Co., 2 R. I. 404, 409 (1853); Townley v. Chicago & C. Ry. Co., 53 Wis. 626, 633 (1881); Tonawanda R. R. Co. v. Munger, 5 Den. 266 (1848); Brown v. Congress & C. Street Ry. Co., 49 Mich. 153 (1882); Granville v. Minneapolis & C. Ry. Co., 10 Fed. Rep. 153 (1882); Hearen v. Pender, L. R., 11 Q. B. D. 503, 507 (1883); Texas & C. Ry. Co. v. Curlin, 13 Tex. Civ. App. 505 (1896); Rapalje & Law. Law Dict. (vol. 2), p. 860, where the cases in which negligence is defined are collected. *Culpable negligence* defined in Chicago & C. Ry. Co. v. Carpenter, 12 U. S. App. 398 (1893). “Courts and judicial writers have often attempted to give a comprehensive definition of the term ‘negligence’ as used in the law. But no definition has yet been given, and it is obvious that none can be given accurate and comprehensive enough to apply to the varying facts and circumstances of every case.” O’Brien, J., in Lane v. Town of Hancock, 142 N. Y. 510, 516 (1894). In popular significance “Negligence and neglect are distinguished thus: Negligence is the habit, and *neglect* the act, of leaving things undone or unattended to. We are negligent as a general trait of character; or are guilty of neglect in particular cases, or in reference to individuals who had a right to our attentions.” Webster’s Dict.

and forms, evidence, questions of law and fact, damages, defenses, contributory negligence, fellow servants, charge to the jury by the trial judge, requests to charge and exceptions.

§ 5. **Negligence is a negative and not a positive term.**— Negligence is essentially a negative and not a positive idea; it is the *not* doing rather than *the doing*; the absence of care rather than the exercise of it. Mr. Justice Willes says: "Confusion has arisen from regarding negligence as a positive instead of a negative word, and it is really the absence of such care as it was the duty of the defendant to use."¹³

§ 6. **Negligence is a relative and not an absolute term.**— Negligence is a relative,¹⁴ and not an absolute or intrinsic term, which must be determined in all cases by a reference to the situation, and knowledge of the parties and all the attendant circumstances. That which might be extra care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and under changed circumstances.¹⁵ So, too, there is no fixed or definite standard by which negligence can be measured; the only test that can be applied by courts and juries is the common sense, sound judgment and common experience of reasonably prudent men — as witnessed in everyday, practical life; except in that class of cases where the statute prescribes the measure of duty, or the courts have laid down definite rules, by which negligence is determined.

¹³ Grill v. General Iron Screw absolute. Cooke v. Baltimore Tract Collier Co., L. R., 1 C. P. 600, 612 Co., 80 Md. 551, 554 (1895). Always (1866). relates to some circumstance of

¹⁴ New Jersey Express Co. v. time, place or persons. Jameson Nichols, 4 Vr. 440 (1867); Brand v. San Jose &c. R. R. Co., 55 Cal. v. Troy &c. R. R. Co., 8 Barb. 378 593 (1880).

¹⁵ The Nitro-Glycerine Case, 15 4 Zab. 824, 830 (1854); Pennsylvania R. R. Co. v. Coon, 111 Pa. on Neg. (5th ed.), § 12. Care and St. 430 (1886); O'Mellia v. Kansas negligence are relative terms. City &c. R. R. Co., 115 Mo. 205, Dougherty v. Missouri R. R. Co., 219 (1893). Negligence is essentially relative and comparative, not 81 Mo. 331 (1884).

§ 7. **Negligence and fraud distinguished.**— Negligence is distinguished from fraud, says Mr. Justice Beardsley, in that, “In the first there is no positive intention to do a wrongful act; but in the latter a wrongful act is ever designed and intended. Negligence in its various degrees ranges between pure accident and actual fraud, the latter commencing where negligence ends; negligence is evidence of fraud but still is not fraud.”¹⁶

§ 8. **Negligence and accident distinguished — Illustrations.**— An accident “is an event,” says Judge Cooley,¹⁷ “which happens unexpectedly and without fault.” It is an event which happens entirely from a superior agency.¹⁸ Negligence differs from accident, or as the law sometimes states it, “inevitable accident,”¹⁹ in that the latter is an event that takes place without one’s foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected.²⁰ Mr. Justice Reade draws out this distinction clearly and sharply by the following illustration; as if a railroad bed be in good order and the engines and cars be in good order and the engineer and other attendants be skillful and careful; and yet a rail breaks, the train is crushed and the employees and passengers are killed; that is an unusual and unexpected event from a known cause, an accident. But if the track be out of order and the engine became

¹⁶ *Gardner v. Heartt*, 3 Den. 237 (1846). To the same effect are *Story on Bail*, § 19; *Shearm. & Redf. on Neg.*, § 3; *Deering on Neg.*, § 5. See *Jones on Bail*, §§ 8–46 *et seq.* “Legal fraud consists in willfully inducing a belief, to the detriment of another, in the existence of a state of facts which the fraud-doer is aware does not exist.” *Kahl v. Love*, 8 Vr. 6 (1874).

¹⁷ *Lewis v. Flint &c. Ry. Co.*, 54 Mich. 55, 56 (1884). See § 1. “An occurrence which could not have been avoided by any degree of care capable of being exercised under the circumstances.” *Stand-*
ard Dict. Eng. Lang. (vol. 1), p. 14, § 16.

¹⁸ *Gault v. Humes*, 20 Md. 297, 304 (1863); *Nave v. Flack*, 90 Ind. 205, 210 (1883). “Responsibility ceases where accident intervenes.” *Rodgers v. Central Pacific R. R. Co.*, 67 Cal. 609 (1885).

¹⁹ *Brown v. Kendall*, 6 Cush. 292, 296 (1850).

²⁰ *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28 (1869); *Crutchfield v. Richmond &c. R. R. Co.*, 76 N. C. 320 (1877); *Brown v. Kendall*, 6 Cush. 292, 296 (1850); *Nave v. Flack*, 90 Ind. 205, 210 (1883); *Deering on Neg.*, § 4; *Brown v. Collins*, 53 N. H. 442 (1873); *Shearm. & Redf. on Neg.* (5th ed.),

unmanageable and on account thereof there be the like results as above stated on the good road, that is not an unusual or unexpected event from such a cause, it is not accident, but it is negligence;²¹ in fact it may be safely assumed that in accident there is always an element of some violence, casualty or *vis major* necessarily involved,²² which is wanting in negligence. Strictly speaking, accidents are occurrences to which human fault does not contribute; but this is only a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of men.²³ For an injury caused purely by inevitable or unavoidable accident while engaged in a lawful business there is no legal liability.²⁴

§ 9. Negligence, heedlessness, and willful mischief distinguished.

— Mr. Austin distinguishes negligence from heedlessness, and says: "Heedlessness differs from negligence, although they are clearly allied. The party who is negligent omits an act, and breaks a positive duty. The party who is heedless does an act, and breaks a negative duty."²⁵ Between negligence and willful mischief there is no difference, but of degree.²⁶ Lord Denman said: "Between willful mischief and gross negligence the boundary line is hard to trace: I should rather say impossible. The law runs them into each other, considering such degree of negligence as some proof of malice."²⁷

²¹ Crutchfield v. Richmond &c. 1 R. R. Co., 76 N. C. 320, 322 (1877). ²⁶ Mangan v. Atterton, L. R., 1 Exch. 239, 240 (1866).

²² Sinclair v. Maritime Passenger Ass. Co., 107 E. C. L. 478 (1861); 3 El. & El. 478. ²⁷ Lynch v. Nurdin, 1 Q. B. 29, 38 (1841). "There is, in truth, no case that has been recognized as

²³ Nave v. Flack, 90 Ind. 205, 210 (1883). sound that holds that the rule as to the responsibility of the wrong-

²⁴ Shearm. & Redf. on Neg., § 5; Ray on Negligence of Imposed Duties, § 22; Brown v. Kendall, 6 Cush. 292 (1850); Wakeman v. Robinson, 1 Bing. 213 (1823). The distinction between an accident and an act of God seems to be that in one case there is not, and in the other case there is, the presence and operation of *vis major*. Pat- terson Railway Acc. Law, 35. doer is different in cases of action- able negligence from that which prevails in cases of willful or malicious torts. There is a difference as to the measure of damages, for, where the tort is malicious, exemplary damages may be recovered, but such damages cannot be recovered in cases of negligence." Elliott, C. J., in Indianapolis &c. Ry. Co. v. Pitzer, 109 Ind.

²⁵ Lect. on Juris. (3d ed.), i, 440; 179, 189 (1886).
cited in Whart. on Neg., § 12.

§ 10. **Negligence and misfeasance distinguished.**—Negligence differs from misfeasance or civil misconduct in that malice in the latter is always implied and a wrong always intended; it is more nearly the equivalent of that which is sometimes stated as gross negligence.²⁸ Negligence is a nonfeasance, not a malfeasance.²⁹

§ 11. **Nonfeasance, misfeasance, and malfeasance defined and distinguished.**—“Nonfeasance is the omission of an act which a person ought to do. Misfeasance is the improper doing of an act which a person may lawfully do. Malfeasance is the doing of an act which a person ought not to do at all,”³⁰ such as trespass.

§ 12. **Negligence and nuisance distinguished.**—Negligence differs from a nuisance and trespass in that a nuisance or trespass from which injury arises is an act which the defendant had no right, by law, to do or attempt to do, *i. e.*, an unauthorized and wrongful act,³¹ while negligence is the “inadvertent imperfection,” of an act which the defendant had by law a right either to do or to attempt to perform. Negligence involves the idea of unintentional injury.³² Nuisance and trespass, on the other hand, imply an intent or willful purpose to accomplish injurious results. A wrong is always intended. The act is presumptively wrong until justified. The law of negligence is, therefore, inapplicable to cases of nuisance and trespass. They are acts of malfeasance as distinguished from nonfeasance and misfeasance. The au-

²⁸ Negligence is more nearly synonymous with carelessness than with any other word. Shearm. & Redf. on Neg., § 2; *State v. Manchester &c. R. R. Co.*, 52 N. H. 562 (1873); *State v. Boston &c. R. R. Co.*, 58 id. 408 (1878). Negligence and ordinary care are correlative terms. *Norfolk &c. R. R. Co. v. Ormsby*, 27 Gratt. 455 (1876).

²⁹ *Pennsylvania Co. v. Sinclair*, 62 Ind. 306 (1878).

³⁰ *Bell v. Joseyln*, 3 Gray, 309, 311 (1855); *Osborn v. Morgan*, 130 Mass. 102 (1881); *Burns v. Pethel*, 75 Hun, 437, 443 (1894). This dis-

tingtion is important in ascertaining the liability of a servant or agent to third persons. They are not liable to third persons for nonfeasance. *Smith's Law of Mast. & Serv.* 415; *Meacham on Agency*, § 572; *Whart. on Neg.*, § 535; *De-laney v. Rochereau*, 34 La. Ann. 1123 (1882).

³¹ *Jeune v. Sutton*, 14 Vr. 257 (1881).

³² *Shearm. & Redf. on Neg.* (5th ed.), § 19; *Blyth v. Birmingham*

Water Works Co., 11 Exch. 781 (1856); *Ruter v. Foy*, 46 Iowa, 132 (1877).

thorities establish a distinction between an action for a willful wrong and an action for negligence;³³ a nuisance being an unauthorized act, such as an unauthorized excavation in a public street. In such case, the wrong consists not in any negligence, but in causing, making or continuing the wrongful or unauthorized excavation in the street.³⁴ An action for injuries from such a cause, a nuisance, is based upon a wrongful act, and special damages arising therefrom furnish ground for a private action without regard to negligence.³⁵

§ 13. **Invitation and license distinguished.**—Invitation is inferred when there is a common interest or mutual advantage, while a license is inferred when the object is the mere pleasure or benefit of the person using it.³⁶ The jury may infer a license from custom.³⁷

§ 14. **Negligence is divisible into three degrees—Denied.**—Negligence has been divided into three degrees — “negligence,” “ordinary negligence,” and “gross negligence;” this classification originated in the civil law,³⁸ and was engrafted into

³³ *Dickinson v. Mayor &c.* New York, 92 N. Y. 584 (1883). The question of care or want of care is not involved in an action for injuries resulting from a nuisance.” in this class of wrongs; it is merely a question of results. *Wood on Law of Nuisances*, p. 34.

³⁴ *Irvine v. Wood*, 51 N. Y. 224, 228 (1872); *Barbage v. Powers*, 130 id. 281 (1891).

³⁵ *Congrese v. Smith*, 18 N. Y. 79, 82 (1858); *Dygert v. Schenck*, 23 Wend. 446 (1840). See *Clifford v. Damm*, 81 N. Y. 52, 56 (1880). Where a permit is necessary to open or obstruct a public street the effect of it would be only to mitigate the act from an absolute nuisance to an act involving care in its construction and maintenance, and to justify such an act it would be necessary not only to plead it, but also to allege and prove a compliance with its terms.

³⁶ *Clifford v. Damm*, 81 N. Y. 52, 56 (1880). “As a general rule, the

³⁶ *Campbell on Neg.; Bennett v. Louisville &c. R. R. Co.*, 102 U. S. 577, 585 (1880). See *Sweeney v. Old Colony &c. R. R. Co.*, 10 Allen,

368 (1865). Case of trespass and license. 1b. Invitation may be express or it may be implied. *Turess v. New York &c. R. R. Co.*, 32 Vr. 318 (1898). “Temptation is not always invitation.” *Holbrook v. Aldrick*, 168 Mass. 16 (1897). A structure erected on land by the owner which is attractive to children is not an invitation to children to enter thereon. *Delaware &c. R. R. Co. v. Reich*, 32 Vr. 635 (1898).

³⁷ *Atchison &c. R. R. Co. v. Cross*, 58 Kan. 424 (1897).
³⁸ *Story on Bail.*, § 18; *Jones on Bail.*, §§ 36-46.

the common law at an earlier period without question; it has always rested upon an apparently arbitrary foundation and has of late years been seriously called into question;³⁹ the general disposition of the courts is to ignore this division as useless.⁴⁰ This classification grew out of the classification of bailments and is founded on one principle or circumstance underlying the law of bailments, viz., of benefit or advantage to bailor or bailee, or of mutual benefit. As this circumstance of mutual benefit or advantage was common to all bailments, it was made the foundation or principle of the classification.⁴¹ This classification has been recognized in the common law as applied to contracts;⁴² and as applied to torts such a classification has been attempted.⁴³ But as the circumstance or principle on which it is founded in contracts, viz.: a mutual benefit to bailor or bailee, is wanting in torts, it is but natural that such an attempt to distinguish degrees of negligence, as applied to torts, should produce confusion.⁴⁴ It is evident, from the very nature of the subject, that such a classification or division is, and must be, a mere abstract, philosophical distinction, of little or no use in practice.⁴⁵

³⁹ *Ohio &c. Ry. Co. v. Selby*, 47 Ind. 484 (1874); *Milwaukee &c. R. Co. v. Armes*, 91 U. S. 494 (1875); *Whart. on Neg.*, § 44; *Story on Bail*, § 17, note 1.

⁴⁰ For a discussion of the degrees of negligence, see 5 *Am. Law Rev.* 38 (1870); *Deering on Neg.*, § 11; *Whart. on Neg.*, § 44; *Ray on Negligence of Imposed Duties*, § 183c; 7 *Am. & Eng. Ency. of Law* (2d ed.), p. 379.

⁴¹ *Wells v. New York Cent. R. R. Co.*, 24 N. Y. 181, 187 (1862).

⁴² *Story on Bail*, § 18.

⁴³ *Dreher v. Town of Fitchburg*, 22 Wis. 675 (1868); *Hammond v. Town of Mukwa*, 40 id. 35 (1876); *Moore v. Cass*, 10 Kan. 291 (1872); *Kansas Pacific Ry. Co. v. Pointer*, 14 id. 50 (1874); *Southern Cotton Press Co. v. Bradley*, 52 Tex. 587, 600 (1880); *Beach on Cont. Neg.* (3d ed.), §§ 61-64.

⁴⁴ *Wells v. New York Cent. R. R. Co.*, 24 N. Y. 181, 187 (1862).

⁴⁵ *Wells v. New York Cent. R. R. Co.*, 24 N. Y. 181, 187 (1862); *Steamboat New World v. King*, 16 How. 474 (1853); *Railroad Co. v. Lockwood*, 17 Wall. 383 (1873); *Milwaukee &c. Ry. Co. v. Armes*, 91 U. S. 489 (1875); *Philadelphia &c. R. R. Co. v. Derby*, 14 How. 486 (1852).

Mr. Justice Allen says this distinction is unsatisfactory for two reasons: First, because "It is not founded upon any principle; and, second, it is not capable of any certain and satisfactory application to individual cases as they arise. Attempts have been made to fix a liability upon the distinction between gross negligence and negligence merely, but courts have been compelled to abandon the attempt, and to say that negligence does not

§ 15. Negligence is divisible into three degrees.—There are authorities holding that there is a clear and well-defined distinction, which does exist in the degrees of negligence, and that

change its character and become anything but negligence by the application of any epithet to it." *Smith v. New York Cent. R. R. Co.*, 24 N. Y. 222, 241 (1862). See in this connection *Perkins v. New York Cent. R. R. Co.*, 24 N. Y. 196, 207 (1862); *Wells v. New York Cent. R. R. Co.*, id. 181, 187 (1862).

The word "gross" as applied to negligence is a word of description and not of definition. *Grill v. General Iron Screw Collier Co.*, L. R., 1 C. P. 600, 612 (1866).

There has been an attempt to describe the cause when it should have been applied to the result; the injury is capable of description and comparison by degrees, while the cause is a fixed, absolute and entire unit, and is not changed as an entire quantity by the addition of words. Indeed, it will be found by an examination of the cases, that what is called gross negligence is not negligence at all, but *quasi* criminal, or civil misconduct, or its equivalent—actual misfeasance. *Owen v. Burnett*, 2 Crompt. & M. 360 (1834); *Wyld v. Pickford*, 8 M. & W. 443 (1841). Or willful injury. *St. Louis &c. R. R. Co. v. Todd*, 36 Ill. 409, 441 (1865).

In England, Lord Denman, in a case depending on the Common Carriers Act, doubted whether any intelligible distinction exists between gross negligence and negligence merely. *Hinton v. Dibbin*, 2 Q. B. 661 (1842).

There is no difference between negligence and gross negligence; that was the same thing with a vituperative epithet. *Wilson v.*

Brett, 11 M. & W. 115 (1843); *Beal v. South Devon Ry. Co.*, 3 H. & C. 337 (1864). Approved in *Grill v. General Iron Screw Collier Co.*, L. R., 1 C. P. 600, 612 (1866).

In the Supreme Court of the United States it has been doubted whether these terms can be usefully applied in practice; their meaning is not fixed or capable of being fixed. *Steamboat New World v. King*, 16 How. 474 (1853); *Philadelphia &c. R. R. Co. v. Derby*, 14 id. 486 (1852); *Railroad Co. v. Lockwood*, 17 Wall. 383 (1873); *Milwaukee &c. Ry. Co. v. Armes*, 91 U. S. 489 (1875).

In Missouri there are no degrees of negligence known to the law, where the subject of bailment is human life. *Siegriest v. Arnot*, 10 Mo. App. 207 (1881).

Gross is not used as expressing the antithesis of a certain defined degree of care, it is used in the sense of "culpable" or "actionable," or else it is a mere epithet. *Siegriest v. Arnot*, 10 Mo. App. 207 (1881).

An instruction by the court that the defendant must be found guilty of willful negligence was held error in *Taylor v. Holman*, 45 Mo. 371 (1870). So in *Indiana*. *Pennsylvania Co. v. Krick*, 41 Ind. 368 (1874); id. 391, 399 (1874); *Ohio &c. Ry. Co. v. Selby*, id. 471 (1874). So in *Alabama*. *Mobile &c. R. R. Co. v. Thomas*, 42 Ala. 672, 714 (1868). So in *Ohio*. *Columbus &c. R. R. Co. v. Webb*, 12 Ohio St. 475, 496 (1861); *Western Union Tel. Co. v. Griswold*, 37 id. 301 (1881); *Meek v. Pennsylvania Co.*, 38 id. 632 (1883).

the distinction is a real and valuable one.⁴⁶ In Texas it is engrafted on the Constitution.⁴⁷ "Gross neglect" is defined as "That entire want of care which would raise a presumption of a conscious indifference to consequences."⁴⁸ The Kentucky Gen. Stats., chap. 57, § 3, provides: If the life of a person is lost or destroyed by "willful neglect" punitive damages may be recovered.⁴⁹ Whether "willful neglect" is the same as "gross neglect" or in any case more or less culpable, is immaterial. It must involve either an intentional wrong or such a reckless disregard of security and right as to imply bad faith.⁵⁰ "Willful neglect" "is an intentional failure to perform a manifest duty, in which the public has an interest, or

In Colorado the Supreme Court said that it did not recognize any degrees of negligence. *Denver Consolidated Electric Co. v. Simpson*, 21 Col. 371, 376 (1895).

In New Hampshire it was said the distinction is after all mainly verbal. *State v. Manchester &c. R. R. Co.*, 52 N. H. 557 (1873); *State v. Boston &c. R. R. Co.*, 58 id. 408 (1878). To the same effect are *Briggs v. Taylor*, 28 Vt. 180, 185 (1855); *Baxter v. Second Ave. R. R. Co.*, 3 Robt. 510 (1865).

⁴⁶ *Shearm. & Redf. on Neg.* (5th ed.), § 47. Such a distinction is recognized in Wisconsin. *Dreher v. Town of Fitchburg*, 22 Wis. 675 (1868); *Ward v. Milwaukee &c. Ry. Co.*, 29 id. 144 (1871); *Cremer v. Town of Portland*, 36 id. 100 (1874); *Hammond v. Town of Mukwa*, 40 id. 35 (1876).

In Kansas it is said the distinction is too well established to require comment. *Moore v. Cass*, 10 Kan. 291 (1872); *Kansas Pacific Ry. Co. v. Pointer*, 14 id. 50 (1874). See *Dudley v. Camden &c. Ferry Co.*, 13 Vr. 25, 28 (1880).

⁴⁷ Const. of Texas, 1876, art. 16, § 26. "When the death is caused by the willful act or omission, or

gross negligence of the defendant, exemplary as well as actual damages may be recovered." *Sayles Civ. Stat.*, art. 2901; *Rev. Stat. Arizona*, § 2147 (1887). *Rev. Stat. of Texas*, art. 2899, provides: That street car companies shall be liable for injury to persons on the track only when the injury is caused by the "gross negligence" of the company. *Dallas City R. R. Co. v. Beeman*, 74 Tex. 291 (1889).

⁴⁸ *Southern Cotton Press &c. Co. v. Bradley*, 52 Tex. 587, 600 (1880). Such distinction has been recognized in Nebraska. *Burlington &c. R. R. Co. v. Wendt*, 12 Neb. 76 (1881).

⁴⁹ Actual intention to commit an injury is not essential to constitute wanton negligence. *Kansas City &c. R. R. Co. v. Campbell*, 6 Kan. App. 417 (1897).

⁵⁰ *Louisville &c. R. R. Co. v. Robinson*, 4 Bush, 509 (1868); *Louisville &c. R. R. Co. v. Filbern*, 6 id. 580 (1869); *Louisville &c. R. R. Co. v. Murphy*, 9 id. 522, 531 (1872). Willful injury and wanton negligence defined in *Memphis &c. R. R. Co. v. Martin*, 117 Ala. 367 (1897).

which is important to the person injured, in either permitting or avoiding the injury.”⁵¹ “Gross neglect” squints at fraud and is tantamount to the *magna culpa* of the civil law, which in some respects is *quasi* criminal;⁵² such indifference is morally criminal, and if it leads to actual injury may well be regarded as criminal in law.⁵³

§ 16. **Legal duty defined—Duty and right distinguished.**—“A legal duty,” says Prof. Wharton, “is that which the law requires to be done or forborne to a determinate person, or to the public at large, and is correlative to a right vested in such determinate person, or the public at large.”⁵⁴ In the law of negligence the words “duty” and “right” are correlative terms.⁵⁵ In a limited sense right is the converse of duty. It is our right, under the law, not to be injured by the negligence of another; it is the duty of others, under the law, not to injure us through negligence. In this sense a duty is that which proceeds from one to another; a right is that which is directed to another — that which he may rightly claim.

§ 17. **A breach of legal duty is of the essence of negligence.**—A violation or breach of a legal duty is of the essence of actionable negligence,⁵⁶ as was said by Mr. Chief Justice Beasley:

⁵¹ Kentucky Central R. R. Co. v. Gastineau, 83 Ky. 119, 128 (1885). To constitute willful negligence the act done or omitted to be done must be intended. Peoria Bridge Assn. v. Loomis, 20 Ill. 235, 251 (1858); Highland Ave. &c. R. R. Co. v. Swope, 115 Ala. 287 (1896); Alabama &c. R. R. Co. v. Burgess, 116 id. 509 (1897); Birmingham &c. Ry. Co. v. Bowers, 110 id. 328 (1895).

⁵² Louisville &c. R. R. Co. v. Robinson, 4 Bush, 509 (1868); Louisville &c. R. R. Co. v. Collins, 2 Duvall, 114 (1865); Board Int. Imp. Shelby County v. Scearce, 2 id. 576 (1864); Beach on Cont. Neg. (3d ed.), § 62.

⁵³ Southern Cotton Press &c. Co. v. Bradley, 52 Tex. 587, 600 (1880).

⁵⁴ Whart. on Neg., § 24.

⁵⁵ Willy v. Mulledy, 78 N. Y. 314 (1879). “Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed.” *Ib.*

⁵⁶ Shearm. & Redf. on Neg. (5th ed.), § 8 *et seq.*; Whart. on Neg., § 3; Deering on Neg., § 3. The theory of liability in negligence cases is the violation of some legal duty to exercise care. Cusick v. Adams, 115 N. Y. 55, 59 (1889). “Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part,

"It is not every one who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss;"⁵⁷ the mere failure to perform a self-imposed duty is not actionable negligence⁵⁸ nor merely a moral duty.⁵⁹ It is that duty which the law creates, and as everybody is presumed to know the law and consequently their legal duty, ignorance of that duty cannot be invoked as a defense to an action to recover damages, caused by negligence.⁶⁰ It may be stated as a fundamental principle in the law of negligence, deducible from the cases reported in the books, that the gist of the action consists in the violation of a legal duty imposed to exercise care, which has caused the injury complained of, and it will be found, upon an examination of the cases, that where no such legal duty proceeded from the defendant to the plaintiff, no legal liability was imposed by the courts for the injury.⁶¹ This principle is not changed or modified by the fact that the injury complained of follows directly or remotely the act or conduct of the parties;⁶² nor from the rule of evidence applicable in a certain class of cases, such as those between passenger and carrier, whereby

has suffered injury to his person v. Collins, 53 N. H. 442 (1873); or property." Brett, M. R., in Phillips v. Library Co., 26 Vr. 307 Heaven v. Pender, L. R., 11 Q. B. (1893). *I. e.*, negligence which D. 503, 507 (1883). does not constitute a breach of

⁵⁷ Kahl v. Love, 8 Vr. 5, 8 (1874). duty is not actionable. Breese v. There can be no negligence, without the existence of a corresponding duty upon the part of the person against whom the negligence is charged. Kennedy v. Chase, 119 Cal. 637 (1898). Trenton Horse R. R. Co., 23 Vr. 250, 253 (1890); 2 Add. on Torts, § 1378; Cooley on Torts, 792.

⁵⁸ Skelton v. London &c. Ry. Co., L. R., 2 C. P. 631 (1867). While the general rule is that the true ground of liability in actions for negligence is not danger but negligence, and the test of negligence is the ordinary usage of business, yet this rule is not applicable where the ordinary usage of business is below what ordinary care requires. Beck v. Hood, 185 Pa. St. 32 (1898).

⁵⁹ Shearm. & Redf. on Neg. (5th ed.), § 10. Such as duties imposed by generosity, kindness, charity. *Ib.*

⁶⁰ Deering on Neg., § 3.

⁶¹ The Nitro-Glycerine Case, 15 Wall. 524 (1872); Losee v. Buchanan, 51 N. Y. 476 (1873); Brown

⁶² The Nitro-Glycerine Case, 15 Wall. 524 (1872).

the proof of the injury, with its attendant circumstances, usually constitutes a *prima facie* case of negligence, which the carrier must overcome. Neither one nor the other of these principles can alter the principle upon which liability for negligence is enforced; which is a violation of a duty imposed by law to exercise care.

§ 18. A breach of legal duty must be shown — Burden of proof.

— Negligence or a breach of legal duty must be shown; it will not be presumed;⁶³ the burden of proof rests with the party asserting or charging negligence. The law does not impute negligence;⁶⁴ thus, where one who does an act lawful in itself, from which damage results to another, is not answerable for such damage, unless he has been guilty of negligence, or other fault, in the manner of doing the act.⁶⁵ As applied to the owner of a steam boiler which he had in use on his own property, it was held that he was not responsible, in the absence of negligence, for the damage done by its bursting.⁶⁶ Mere permission to pass over dangerous lands, or acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner, except to refrain from acts willfully injurious.⁶⁷ It was held in the famous English case of *Fletcher v. Rylands*,⁶⁸ that if one brings upon his land anything which would not naturally come upon it,

⁶³ *Philadelphia &c. R. R. Co. v. Hummell*, 44 Pa. St. 375 (1863); *Palmer v. New York &c. R. R. Co.*, 112 N. Y. 245 (1889); *McGrell v. Buffalo Office Building Co.*, 153 id. 265, 273 (1897); *Jacksonville Street Ry. Co. v. Chappell*, 21 Fla. 175 (1885); *Quinn v. Johnson Forge Co.*, 9 Houst. 338 (Del. 1892).

⁶⁴ *Norfolk &c. R. R. Co. v. Ferguson*, 79 Va. 241 (1884); *Quinn v. Johnson Forge Co.*, 9 Houst. 338 (Del. 1892). So it must be shown that the breach of duty was the proximate cause of the damage; it will not be presumed. *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228 (1884); *Shearm. & Redf. on Neg.* (5th ed.), § 25.

⁶⁵ *Losee v. Buchanan*, 51 N. Y. 476 (1873), affirming 42 How. Pr. 385; reversing 61 Barb. 86; *Brown v. Collins*, 53 N. Y. 442 (1873); *Marshall v. Welwood*, 9 Vr. 339 (1876); *Phillips v. Library Co.*, 23 id. 307 (1893); *The Nitro-Glycerine Case*, 15 Wall. 524 (1872); *Ulshowski v. Hill*, 32 Vr. 375 (1898).

⁶⁶ *Marshall v. Welwood*, 9 Vr. 339 (1876).

⁶⁷ *Phillips v. Library Co.*, 26 Vr. 307 (1893).

⁶⁸ 3 Hurl. & Colt. 774 (1865); reversed in the Exchequer Chamber, L. R., 1 Exch. 265 (1866); which was affirmed in the House of Lords, L. R., 3 H. L. 330 (1868).

such as water artificially collected, and which is, in itself, dangerous, and may become mischievous, if not kept under proper control, though in so doing he may act without personal willfulness or negligence, he will be liable in damages for any mischief or damage thereby occasioned. A distinction is made in this case between the ordinary manner of the use of the land and an artificial use in the former case, there being no legal liability without willfulness or negligence. *Fletcher v. Rylands* was followed by the English courts in the case of *Fletcher v. Smith*.⁶⁹ It has been applied to a variety of different facts, such as holding a tenant liable for damage caused by sewage escaping into his neighbor's cellar, although he has not been guilty of negligence.⁷⁰ The English courts have limited or distinguished the rule laid down in *Fletcher v. Rylands*, by holding that where water is stored in reservoirs and escapes in consequence of extraordinary floods, thereby doing damage, in the absence of negligence there is no liability;⁷¹ Mellish, L. J.: "But the present case is distinguished from that of *Rylands v. Fletcher* in this: that it is not the act of the defendant in keeping this reservoir,—an act in itself lawful,—which alone leads to the escape of the water and so renders wrongful that which, but for such escape, would have been lawful. It is the supervening *vis major* of the water caused by the flood, which superadded to the water in the reservoir,—which of itself would have been innocuous,—causes the disaster."⁷²

⁶⁹ L. R., 7 Exch. 305 (1872); affirmed, 2 App. Cas. 781 (1877).

⁷⁰ *Humphreys v. Cousins*, L. R., 2 C. P. D. 239 (1877), applied to a case where one knowingly planted on his own land and suffered to grow over the land of his neighbor a noxious tree by which his neighbor's cattle were injured, an action will lie against him at the suit of such neighbor. *Crowhurst v. Amersham Burial Board*, L. R., 4 Exch. D. 5 (1878). See 7 Cent. L. J. 465; 18 Alb. L. J. 514.

⁷¹ *Nichols v. Marsland*, L. R., 10 Exch. 255 (1875); affirmed, L. R., 2 Exch. D. 1 (1876).

⁷² *Ib.* So water stored in a reservoir released by act of third persons. *Box v. Jubbs*, L. R., 1 C. P. D. 423 (1879). Distinguished from a case where it was held, that the tenant of an upper floor of a building is not liable, in the absence of negligence, for damages caused by water escaping from his water-closet to the lower floor. *Ross v. Fedden*, L. R., 7 Q. B. 661 (1872). Other English cases applying and limiting the doctrine of *Fletcher v. Rylands* in 1 *Thomp. on Neg.*, § 7, p. 93.

§ 19. Ordinary care, reasonable care, utmost care defined.—

The standard or test which the law exacts in the performance of a legal duty is "ordinary care," and it is the disregard of such care that constitutes negligence. "Ordinary care" may be described rather than defined. "Ordinary care, skill and diligence is such a degree of care, skill and diligence as men of ordinary prudence, under similar circumstances, usually employ. If the danger be great and threatening, then a higher degree of skill and care is requisite in order to prevent it; and in case of great danger, great care and caution will be but ordinary care, but if the circumstances are such that but little risk or danger may be reasonably apprehended, then a much less degree of care will be ordinary care."⁷³ It is that degree of care which a person of ordinary prudence is presumed to use, under the particular circumstances, to avoid injury. It must be in proportion to the danger to be avoided, and the fatal consequences involved in its neglect.⁷⁴ The de-

⁷³ *Brown v. Lynn*, 31 Pa. St. 510, (1887). "Ordinary care is that care which a reasonable, prudent and cautious man would take to avoid injury under like circumstances." *Chicago &c. R. R. Co. v. Cont. Neg.* (3d ed.), §§ 21-23. *Adler*, 129 Ill. 340 (1889). "Such Master's liability for injuries to servants. *Bailey*, pp. 3-12; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 417 (1891); *Holly v. Boston Gas Light Co.*, 8 Gray, 131 (1857); *Shaw v. Boston &c. Ry. Co.*, id. 79 (1857).

⁷⁴ *Toledo &c. Ry. Co. v. Goddard*, 25 Ind. 185, 197 (1865); *Mayor &c. New York v. Bailey*, 2 Den. 433 (1844). "Reasonable care requires care to be exercised in proportion to the danger of doing harm to others. Whatever may be the dangerous circumstances, reasonable care must be exercised to prevent harm." *Park, C. J.*, in *Dexter v. McCready*, 54 Conn. 171, 172 (1886). "Ordinary care is that degree which is exercised by ordinarily prudent persons under similar circumstances." *Needham v. Louisville &c. R. R. Co.*, 85 Ky. 434 (1887). "Ordinary care is that care which every prudent man observes." *Richmond &c. R. R. Co. v. Howard*, 79 Ga. 44, 53 (1887). "Reasonable care is such as prudent persons exercise, when contemplating the danger that may be encountered at such crossings." * * * "Reasonable care requires, in all cases, the exercise of vigilance proportioned to the danger encountered." *Barker v. Savage*, 45 N. Y. 191 (1871). The measure of care required of a young child is simply such as might reasonably be expected, under the circumstances, of a child of that age. *Stone v. Dry Dock &c. R. R. Co.*, 115 N. Y. 104

gree of care exacted by the law is always in proportion to the danger to be apprehended.⁷⁵ The Supreme Court of Errors of Connecticut has said: The exact boundary between the several degrees of care and their correlative degrees of carelessness, or negligence, are not always clearly defined or easily pointed out. We think, however, that by "ordinary care" is meant that degree of care which may readily be expected from a person in the party's situation, and that gross negligence imports not a malicious intention or design to produce a particular injury, but a thoughtless disregard of consequences; the absence, rather than the actual exercise, of volition with reference to results. What is the measure of "reasonable care" must, of course, depend upon the circumstances of the particular situation in which the party at the time is placed.⁷⁶ It is, therefore, generally a question of fact to be submitted to the jury under instructions from the court, although in some classes of cases definite rules are laid down by the courts by which "ordinary care" is determined.⁷⁷ The law hedges around the lives and persons of men with much more care

(1889). "Regard is to be had to the growth of science, and the improvement in the arts, which take place from generation to generation." Shearm. & Redf. on Neg. (5th ed.), § 12. Ordinary care "is such care as ought reasonably to be expected of an ordinarily prudent person in the same situation as that of the individual whose conduct is in question in the particular case." Keown v. St. Louis R. R. Co., 141 Mo. 86, 94 (1897). "Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute ordinary care, the absence of which is negligence. But it is a question of degree only. The kind of care is precisely the same." 148 Ind. 54, 58 (1896). See Mis-

souri &c. Ry. Co. v. Hanning, 91 Tex. 347 (1897); Galveston &c. Ry. Co. v. Gormley, id. 393 (1898); 7 Am. & Eng. Ency. of Law (2d ed.), pp. 375-378.

⁷⁵ Meredith v. Reed, 26 Ind. 334, 336 (1866).

⁷⁶ Neal v. Gillett, 23 Conn. 427, 443 (1855); Price v. New Jersey &c. Transp. Co., 2 Vr. 229, 237 (1865); Beach on Cont. Neg. (3d ed.), §§ 21-23; Bailey on Masters' Liability for Injuries to Servants, pp. 3-12. The phrase "ordinary care" is equivalent to "reasonable care." Fallon v. City of Boston, 3 Allen, 38, 39 (1861). They are interchangeable. Kendall v. Brown, 74 Ill. 232, 237 (1874). The terms "negligence" and "ordinary care" are correlative terms. Norfolk &c. R. R. Co. v. Ormsby, 27 Gratt. 455 (1876).

⁷⁷ Grand Trunk Ry. Co. v. Ives, 144 U. S. 417 (1891).

than it employs when guarding their property, so that, in this particular, it makes, in a way, every one his brother's keeper.⁷⁸ It has been said, that in all cases in which a person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the *persons or lives* of one or more human beings, known or unknown, the law, *ipso facto*, imposes, as a public duty, the obligation to exercise such care and skill.⁷⁹ "The utmost care and diligence," "the highest degree of care and diligence," are expressions to measure the care and diligence which a prudent man would exert in that business under like circumstances.⁸⁰ Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions "utmost care and diligence," "most exact care," and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of the different devices and provisions for safety, and the relative risk of injury from different possible causes of it.⁸¹

§ 20. **Intent and design are not elements of negligence.**—Design and intent are not elements which enter into the determination of legal negligence,⁸² as was pointed out in a previous section, they

⁷⁸ Chief Justice Beasley in *Van Winkle v. American Steam Boiler Co.*, 23 Vr. 240 (1890). So too *Thomas v. Winchester*, 6 N. Y. 397 (1852); *Shearm. & Redf. on Neg.* (5th ed.), § 47. As applied to the business of railroads. See *Michigan Cent. R.R. Co. v. Coleman*, 28 Mich. 448 (1874). When lives of persons are endangered no higher degree of care is exacted. *Galveston & C. Ry. Co. v. Gormley*, 91 Tex. 393 (1898).

⁷⁹ *Van Winkle v. American Steam Boiler Co.*, 23 Vr. 240 (1890); *Shearm. & Redf. on Neg.* (5th ed.), § 47; *Ray on Negligence of Imposed Duties*, § 183c.

⁸⁰ *Cole, C. J.*, in *Hencke v. Milwaukee City Ry. Co.*, 69 Wis. 401, 408 (1887); *Willey v. Allegheny City*, 118 Pa. St. 490 (1888); *Shearm. & Redf. on Neg.* (5th ed.), § 46.

⁸¹ *Knowlton, J.*, in *Dodge v. Boston & C. Steamship Co.*, 148 Mass. 207, 218 (1889); *S. P., Chicago & C. R. R. Co. v. Arnol*, 144 Ill. 261, 272 (1893).

⁸² *Deering on Neg.*, § 2; *Shearm. & Redf. on Neg.* (5th ed.), § 19; *Whart. on Neg.*, § 11; *Williams v. Hays*, 143 N. Y. 442, 446 (1894). That one had reason to anticipate that his negligence would injure another is not an essential ele-

are distinguishing tests of fraud. They are always characteristic of criminal law. The law looks to the person damaged by another and seeks to make him whole without reference to the purpose or the condition, mental or physical, of the person causing the damage.⁸³ It is not essential to legal liability flowing from negligent acts or conduct that the damage or injury resulting therefrom might "reasonably have been expected" because men are presumed in law to intend the natural and probable consequences of their acts;⁸⁴ intent is not, therefore, an element in the proof of negligence. Intent to do an injury to another is something more than negligence, it is *quasi-criminal*.

§ 21. Negligence — Proximate cause — Injury resulting from two causes.— An elementary rule in the law of negligence of universal application is, that the plaintiff must show, and the burden of proof is with the plaintiff to show, that the violation or omission of duty complained of was the proximate cause of the plaintiff's injuries.⁸⁵ A proximate cause is that cause which naturally led to, and which might have been expected to produce, the result.⁸⁶ The application of this rule is attended with perplexing difficulties. It is one thing to understand a rule of law, and quite a different task to apply it well. As has been said by Mr. Justice Barrows, of the Supreme Court of Maine: "If it ever happens that logic and common sense cannot be reconciled in the application

ment. Beven on Neg. 81; Smith v. London &c. Ry. Co., L. R., 6 C. P. 14 (1870).

⁸³ Williams v. Hays, 143 N. Y. 442, 446 (1894).

⁸⁴ Whart. on Neg., § 16; Shearm. & Redf. on Neg. (5th ed.), §§ 19, 21.

⁸⁵ Shearm. & Redf. on Neg., chap. 11, § 25 *et seq.*; Deering on Neg., § 2; 2 Thomp. on Neg. 1083; Whart. on Neg., § 73 *et seq.*, "Casual Connection;" Beach on Cont. Neg. (3d ed.), §§ 24-34; 7 Am. & Eng. Ency. of Law (2d ed.), p. 381; 3 Sutherland on Damages, 714; Cooley on Torts, 69; Addison on Torts (3d ed.),

5; Ehrgott v. Mayor &c. New York, 96 N. Y. 264 (1884); Norwood v. Raleigh &c. R. R. Co., 111 N. C. 236 (1892); Florida &c. R. R. Co. v. Williams, 37 Fla. 406 (1896); Bitting v. Township of Maxatawny, 177 Pa. St. 213 (1896). The breach of duty upon which an action is brought must not only be the cause, but the proximate cause of the damages to the plaintiff. Wabash R. R. Co. v. Coker, 81 Ill. App. 660 (1898).

⁸⁶ State v. Manchester &c. R. R. Co., 52 N. H. 528 (1873); Laidlaw v. Sage, 158 N. Y. 73 (1899).

of this doctrine to the decision of causes, logic must give way.”⁸⁷ Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer.⁸⁸ The connection of cause and effect must be established.⁸⁹ It is also a principle well settled that when an injury is caused by two causes concurring to produce the result, for one of which the defendant is responsible and not for the other, the de-

⁸⁷ *Willey v. Inhabitants of Belfast*, 61 Me. 569, 575 (1872). “We may take occasion here to add that the doctrine of contributing causes produces annually a crop of disputations, which savor more of the subtleties and learning of the schoolmen than of a desire to evolve any practical, intelligible rule which shall be of service in administering justice between party and party.” *Ib.*

“The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice.” *Baltimore & C. R. R. Co. v. Reaney*, 42 Md. 117, 136 (1874). See *Fleming v. Beck*, 48 Pa. St. 309 (1864); *Wood v. Pennsylvania R. R. Co.*, 117 id. 306 (1896).

⁸⁸ *Hammill v. Pennsylvania R. R. Co.*, 27 Vr. 370, 379 (1894). On this subject Mr. Justice Lippincott, of the Supreme Court of New Jersey, said: “If there could be deduced from them (*i. e.*, the cases) the very best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon very nice discriminations, the border line at which the natural sequence

ceases to exist and become unnatural is, it seems to me, extremely difficult to determine.” *Id.* 378.

Rothrock, J. “Much has been written upon the subject of proximate and remote causes, as applied to injuries on the ground of negligence. The books are full of refined reasoning and distinctions as to conditions and causes and casual connections, and the like; but, after all, courts and juries should determine these questions upon common-sense principles, within the comprehension of the ordinary triers of questions of fact.” *Newman v. Chicago & C. Ry. Co.*, 80 Iowa, 672, 680 (1890); *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134 (1892); *Pittsburgh & C. Ry. Co. v. Taylor*, 104 Pa. St. 306 (1883). See *Thompson v. Louisville & C. R. R. Co.*, 91 Ala. 496 (1890); *Christianson v. Chicago & C. Ry. Co.*, 67 Minn. 94 (1896); *Shearm. & Redf. on Neg.* (5th ed.), § 28.

⁸⁹ *Shearm. & Redf. on Neg.* (5th ed.), § 25; *Daniel v. Metropolitan Ry. Co.*, L. R., 3 C. P. 216, 222 (1868); *Kistner v. City of Indianapolis*, 100 Ind. 210 (1884). For a full statement of the law with a citation of authorities on proximate cause, see *Shearm. & Redf. on Neg.* (5th ed.), chap. 11, §§ 25-40.

fendant cannot escape responsibility.⁹⁰ One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence.⁹¹ Proximate or remote cause is important as bearing upon the defense of contributory negligence. The rule at common law is, that one who suffers an injury for want of that ordinary care which a prudent man would have exercised under the circumstances is remediless, because he may be said to have caused the injury by his contributory negligence.⁹² It is that negligence of the plaintiff operating as an efficient cause of the injury, in connection with the fault of the defendant, which is a defense to the action.⁹³ It must be that negligence of the plaintiff which co-operates in causing the injury, and without which the injury would not have happened.⁹⁴

§ 22. Violation of a duty imposed by statute.—Failure to perform a duty imposed by statute, such as to give statutory signals at public crossings by railroad companies, constitutes actionable negligence.⁹⁵ Or upon a failure to comply with a statute which requires a flagman or watchman to be stationed at such crossings,⁹⁶ or a failure to provide fire-escapes as required by statute.⁹⁷ But to fasten liability upon the defend-

⁹⁰ *Baltimore &c. R. R. Co. v. Sulphur Springs*, 96 Pa. St. 65 (1880); *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243 (1894); *Rodgers v. Central Pacific R. R. Co.*, 67 Cal. 607 (1885); *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700 (1882); *Harriman v. Pittsburgh &c. Ry. Co.*, 45 Ohio St. 32 (1887); *Lane v. Atlantic Works*, 111 Mass. 136 (1872); *Ouverson v. City of Grafton*, 5 N. Dak. 281 (1895).

⁹¹ *Chicago &c. Ry. Co. v. Chambers*, 68 Fed. Rep. 153 (1895); *Coppins v. New York &c. R. R. Co.*, 122 N. Y. 557 (1890); *McGregor v. Reid &c. Co.*, 178 Ill. 464 (1899); *City of Flora v. Pruett*, 81 Ill. App. 161 (1898).

⁹² *Ray on Negligence of Imposed Duties*, § 184.

⁹³ *Fairbanks v. Kerr*, 70 Pa. St. 86 (1871).

⁹⁴ *Lehigh Valley R. R. Co. v. Greiner*, 113 Pa. St. 600 (1886).

⁹⁵ *Chicago &c. R. R. Co. v. Boggs*, 101 Ind. 522 (1884); *Indiana &c. Ry. Co. v. Barnhart*, 115 Ind. 399 (1888); *Platte &c. Co. v. Dowell*, 17 Col. 376 (1892).

⁹⁶ *Western &c. R. R. Co. v. Young*, 81 Ga. 397 (1888); *Curley v. Illinois Cent. R. R. Co.*, 40 La. Ann. 810 (1888).

⁹⁷ *Willy v. Mulledy*, 78 N. Y. 310 (1879). The duty so imposed is both created and measured by the statute. *Pauley v. Steam Gauge &c. Co.*, 131 N. Y. 90, 96 (1892). *Druggist failing to label poisonous liquid as required by statute*. *Wise v. Morgan*, 101 Tenn. 273 (1898).

ant it must be shown that the failure to use the safeguards or perform the acts required by the statute, was the cause of the accident.⁹⁸ In Indiana it was held that the court had a right to instruct the jury, as a matter of law, that a failure to give statutory signals at public crossings by railroad companies constituted negligence.⁹⁹ When a defendant and its agents conform to legislative directions, such as giving audible signals of the approach of a train, it is within the protection of the law, and is absolved from negligence so far as those particular things, required by the statute, are concerned,¹ although there is a class of cases which hold, that a prescribed statutory duty is only cumulative and not sufficient in itself.² On the other hand, negligence in the exercise of a prescribed statutory duty is actionable, if such negligent acts caused the injury.³

§ 23. Failure to comply with requirements of ordinances by railroad companies.—In some of the States it has been held that a failure to comply, by railroad companies, with the requirements of a valid ordinance, in running their trains within the limits of a city, is negligence *per se*.⁴ Such as running a

Or employing child in mining contrary to statute. *Queen v. Dayton &c. Co.*, 95 Tenn. 458 (1895). See *Allan v. State S. S. Co.*, 132 N. Y. 91 (1892); *Klatt v. N. C. Foster Lumber Co.*, 97 Wis. 641 (1897); *Morris v. Stanfield*, 81 Ill. App. 264 (1898).

⁹⁸ *Coal Run Coal Co. v. Jones*, 127 Ill. 379 (1889); *Dodge v. Burlington &c. R. R. Co.*, 34 Iowa, 276 (1872); *Christner v. Cumberland &c. Coal Co.*, 146 Pa. St. 67 (1892); *Chrystal v. Troy &c. R. R. Co.*, 124 N. Y. 519 (1891); *Lake Shore &c. Ry. Co. v. Parker*, 131 Ill. 557 (1890); *Baltimore &c. Ry. Co. v. Conoyer*, 149 Ind. 524 (1897).

⁹⁹ *Chicago &c. R. R. Co. v. Boggs*, 101 Ind. 522 (1884); *Baltimore &c. Ry. Co. v. Conoyer*, 149 id. 524 (1897). See *Smith v. Southern Ry. Co.*, 53 So. Car. 121 (1898).

¹ *New York &c. R. R. Co. v. Leaman*, 25 Vr. 202, 206 (1891); *Chicago &c. R. R. Co. v. Dougherty*, 110 Ill. 521 (1884).

² *New York &c. R. R. Co. v. Leaman*, 25 Vr. 202, 206 (1891).

³ *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259 (1868); *Bettle v. Camden &c. R. R. Co.*, 26 Vr. 615, 622 (1893). "A negligent exercise of the right or the negligent performance of the duty can in no event be excused." *Ib.*; *Thomas on Neg.* 404; *Shearm. & Redf. on Neg.* (5th ed.), §§ 13, 467, 468.

⁴ *Alabama: Gothard v. Alabama &c. R. R. Co.*, 67 Ala. 114, 120 (1880).

Georgia: Western &c. R. R. Co. v. Young, 81 Ga. 397 (1888); *Central R. R. Co. v. Curtis*, 87 id. 416 (1891).

railroad train at a rate of speed prohibited by the city ordinance;⁵ or a failure to keep a flagman or watchman stationed at a street crossing as required by the ordinance.⁶ But in other States it has been held that a violation of an ordinance is "some evidence of negligence" only.⁷

§ 24. **Dangerous or illegal work done under contract.**—Where one is under a primary obligation to perform a duty imposed by law, he cannot release himself from liability for its non-performance, by a contract which he may make for its performance by another person.⁸ As where a person or corporation is authorized by statute, or bound by contract, to do a particular work, he cannot avoid responsibility by contracting with another person to do that work.⁹ The distinction appears to be, that, when work is being done under a contract, if an

Iowa: *Dodge v. Burlington &c. R. R. Co.*, 34 Iowa, 276 (1872); *Correll v. Burlington &c. R. R. Co.*, 38 id. 120 (1874). See *Shearm. & Redf. on Neg.* (5th ed.), § 13; *Thomas on Neg.* 404.

Minnesota: *Bott v. Pratt*, 33 Minn. 323 (1885).

Missouri: *Murray v. Missouri Pac. Ry. Co.*, 101 Mo. 236 (1890); *Keim v. Union &c. Co.*, 90 id. 314, 321 (1886).

Texas: *Gulf &c. Ry. Co. v. Pendery*, 14 Tex. Civ. App. 60 (1896).

Wisconsin: *Smith v. Milwaukee Builders &c. Exch.*, 91 Wis. 360 (1891).

⁵ *Correll v. Burlington &c. R. R. Co.*, 38 Iowa, 120 (1874).

⁶ *Murray v. Missouri Pac. Ry. Co.*, 101 Mo. 236.

⁷ Maryland: The violation of the ordinance is not *per se* such negligence on the part of the defendant as will afford a cause of action. *Reidel v. Philadelphia &c. R. R. Co.*, 87 Md. 153 (1897).

Pennsylvania: "It is merely evidence of negligence." *Connor v. Electric Traction Co.*, 173 Pa. St.

⁸ *Shearm. & Redf. on Neg.* (5th ed.), § 14. "His obligation is to do the thing, not merely to employ another to do it." *Hole v. Sittingbourne &c. Ry. Co.*, 6 Hurlst. & N. 488 (1861); *Pickard v. Smith*, 10 C. B. (N. S.) 480 (1861); *Village of Jefferson v. Chapman*, 127 Ill. 438 (1889). Applied to the liability of a city or village where it was held that a city or village cannot divest itself of its duty to control and supervise the improvements and repairs of the streets and sidewalks it directs to be made, by simply making a contract therefor, and thereby exonerate itself from liability for an injury occasioned by the negligent manner in which the work is done by the contractor. *Ib.*; *Veazie v. Penobscot R. R. Co.*, 49 Me. 119 (1860); *Hayes v. West Bay City*, 91 Mich. 418 (1892).

⁹ *Hole v. Sittingbourne &c. Ry. Co.*, 6 Hurlst. & N. 488 (1861).

accident happens and an injury is caused by negligence, in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But, when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, then the employer must be presumed to have authorized the act, and to be responsible for it.¹⁰ When one contracts with another to do a wrongful thing, such as digging in a highway, he cannot relieve himself from the consequences by the terms of his contract, by which the contractor stipulated to guard against accidents.¹¹ Or where the contract directly requires the performance of a work which, however skillfully done, will be intrinsically dangerous.¹²

§ 25. Federal and State courts, when not bound by each other's decisions.—The United States Supreme Court said, in a case brought up from Massachusetts, in which a statute of that State was under review, which forbids travelling on Sunday except “for necessity or charity,” that the courts of the United States adopt and follow the decisions of the highest court of a State on questions which concern merely the Constitution or laws of that State; also where a course of those decisions, whether founded on the statute or not, have become rules of property within the State; also in regard to rules of evidence in actions at law; and also in reference to the common law of the State, and its laws and customs of a local character, when established by repeated decisions.¹³ In a case involving the liability of a master for injuries to a servant caused by the

¹⁰ Wilde, B., in *Hole v. Sittingbourne &c. Ry. Co.*, 6 Hurlst. & N. 488, 499 (1861). Or if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants. *Ellis v. Sheffield Gas Consumers' Co.*, 2 Ellis & B. 767 (1853).

¹¹ *Congreve v. Smith*, 18 N. Y. 79 (1858); *Creed v. Hartmann*, 29 id. 591 (1864). Or the building of

area-walls and constructing coal vaults abutting on a street. *Hawver v. Whalen*, 49 Ohio St. 69 (1892).

¹² *Village of Jefferson v. Chapman*, 127 Ill. 438 (1889); *Waller v. Lasher*, 37 Ill. App. 609 (1890).

¹³ *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555 (1888). See *Burgess v. Seligmen*, 107 id. 20 (1882).

negligence of a fellow servant the same court said that the point involved was not a question of local law, to be settled by the decisions of the highest court of the State in which a cause of action arises, but is one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relation of master and servant.¹⁴ But whether a right of action survives, is governed in the Federal courts by local or State law.¹⁵ On the other hand the State courts are not bound by the decisions of the United States courts on questions involved in accident cases and kindred subjects. But they are guided and bound by the decisions of the highest court of the State in which the questions are presented for adjudication; as was said by Vice-Chancellor Pitney of New Jersey: "While the utterances of the Supreme Court of the United States are binding throughout the Union upon certain constitutional and statutory questions, and are entitled to great weight upon all questions, they cannot be considered as authoritative on such as are here involved, outside of the District of Columbia."¹⁶

§ 26. **No contribution between joint tortfeasors.**—There can be no claim for contribution between joint tortfeasors. One or all are liable for the consequences of the negligent act committed by joint tortfeasors. There can be but one satisfaction, payment made by one, and a release given by one will discharge all.¹⁷ Although several judgments may be recov-

¹⁴ *Baltimore &c. R. R. Co. v. Baugh*, 149 U. S. 368 (1893); *Howard v. Delaware &c. Co.*, 40 Fed. Rep. 195, 197 (1889).

So it is a question of general law whether a suit can be maintained in one jurisdiction when death was caused in a different jurisdiction. *Texas &c. Ry. Co. v. Cox*, 145 U. S. 593 (1892).

¹⁵ *Schreiber v. Sharpless*, 110 U. S. 76 (1883); *Baltimore &c. R. R. Co. v. Joy*, 173 U. S. 226 (1899). Whether a pending action for personal injuries may be revived upon the death of the party is to be de-

termined by the laws of the State where the action is brought and is not affected by the fact that the injury occurred in another State. *Baltimore &c. R. R. Co. v. Joy*, 173 U. S. 226 (1899).

¹⁶ *Merchants &c. Co. v. Borland*, 8 Dick. 295 (N. J. 1895).

¹⁷ *Newman v. Fowler*, 8 Vr. 89, 90 (1874); *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. St. 187 (1868); *Spurr v. North Hudson County R. R. Co.*, 27 Vr. 346 (1894); *Turton v. Powelton Electric Co.*, 185 Pa. St. 406 (1898); *Eaton v. Boston &c. R. R. Co.*, 11 Allen, 500

ered, the plaintiff can have but one satisfaction;¹⁸ the reason for the rule being that the law will not undertake to adjust the burthens of misconduct.¹⁹

(1866); *Brown v. City of Cambridge*, 3 id. 474, 476 (1862). The same doctrine applies to torts for which the injured party has an election to sue one or more parties separately, such as master or servant. *Ib.* ¹⁸ *Severin v. Eddy*, 52 Ill. 189 (1869); *Gross v. Pennsylvania &c. R. R. Co.*, 65 Hun, 191 (1892). ¹⁹ *Newman v. Fowler*, 8 Vr. 89, 90 (1874). See *Shearm. & Redf. on Neg.* (5th ed.), § 31.

CHAPTER II.

GENERAL PRINCIPLES — Continued.

COMMON LAW AND STATUTORY LIABILITY, AS APPLIED BY THE COURTS IN THE TRIAL OF ACCIDENT CASES.

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| <p>§ 27. Common carriers of passengers — Utmost care.</p> <p>28. Liability is independent of contract.</p> <p>29. Liability of street railway companies to passengers — Starting and stopping.</p> <p>30. Liability of common carriers for injuries at depots, stations and platforms.</p> <p>31. Liability of common carriers to strangers and trespassers.</p> <p>32. Contractors — Statutes.</p> <p>33. Electricity and electrical appliances.</p> <p>34. Elevators.</p> <p>35. Domestic animals.</p> <p>36. Negligent use of firearms.</p> <p>37. Explosion of fireworks.</p> <p>38. Liability of those engaged in games and sports.</p> <p>39. Infants, idiots and lunatics.</p> <p>40. Parents not liable for torts of infants — Statutes.</p> <p>41. Innkeepers—No presumption of negligence from fire.</p> <p>42. Highways — Abutting owners.</p> <p>43. Injuries received on streets.</p> <p>44. License to interfere with highways.</p> <p>45. Gas companies.</p> <p>46. Temporary use of highways for building or trade.</p> <p>47. Turnpike and plank-road companies — Statutes.</p> <p>48. Bridges — Statutes.</p> <p>49. Wharves and piers.</p> | <p>§ 50. Riding and driving.</p> <p>51. Bicycles.</p> <p>52. Liability of street railway companies to vehicles and pedestrians.</p> <p>53. The rule stated — New York.</p> <p>54. The rule stated — Pennsylvania.</p> <p>55. Railroad crossings.</p> <p>56. Duty of traveller to look and listen.</p> <p>57. Construction and maintenance of crossings.</p> <p>58. Statutory signals.</p> <p>59. Landlord and tenant.</p> <p>60. Landlord and tenant — Tenement or apartment-houses.</p> <p>61. When tenant is liable.</p> <p>62. When lessor and tenant are jointly liable.</p> <p>63. Master and servant — Liability of master for servant's acts.</p> <p>64. The relation of master and servant must exist.</p> <p>65. Liability of master to servants — Negligence of fellow servants — Statutes.</p> <p>66. Master does not insure servants against risks.</p> <p>67. Safe place to work — Tools — Machinery — Appliances.</p> <p>68. Inspection.</p> <p>69. Duty to select competent and sufficient fellow servants — To make rules.</p> <p>70. Inexperienced and youthful servants—Instructions and warnings.</p> |
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| <p>§ 71. Delegation by master of his personal duties.</p> <p>72. Liability of servants to third persons or to fellow servants.</p> <p>73. Liability of municipal corporations—Common law — Statutes.</p> <p>74. Liability of municipal corporations — Highways.</p> <p>75. Liability of municipal corporations — Notice.</p> <p>76. Liability for injuries from the use of private premises.</p> <p>77. Explosions — Blasting.</p> | <p>§ 78. Unwholesome and offensive occupations.</p> <p>79. Licensees — Trespassers.</p> <p>80. Spring guns.</p> <p>81. Children — Conflicting decisions.</p> <p>82. Public officers.</p> <p>83. Public trustees.</p> <p>84. Physicians and surgeons — Dentists.</p> <p>85. Receivers.</p> <p>86. Liability of the State.</p> <p>87. Liability for injuries on vessels — Act of Congress.</p> <p>88. Vendors and manufacturers of dangerous articles — Druggists.</p> |
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§ 27. Common carriers of passengers — Utmost care.—Common carriers of passengers are not insurers of the lives or safety of their passengers.¹ They are bound to use the utmost care, skill and diligence that human foresight, skill or experience can suggest to careful, diligent and skillful persons in the construction of the roadbed, cars, machinery appliances and in their use, in the management of the business.² This utmost care is exacted by the law as a standard of duty; courts

¹ *Readhead v. Midland Ry. Co., &c. Ry. Co.*, 93 Va. 44 (1896). *Who L. R.*, 2 Q. B. 412 (1867); 4 id. 379 (1869); *Breen v. New York &c. R. Co.*, 109 N. Y. 297 (1888); *Palmer v. Delaware &c. Canal Co.*, 120 N. Y. 170 (1890); *Louisville &c. Ry. Co. v. Snyder*, 117 Ind. 435 (1888); *Chicago &c. R. R. Co. v. Pillsbury*, 123 Ill. 9 (1887); *Simmons v. New Bedford &c. Steamboat Co.*, 97 Mass. 361 (1867); *In-galls v. Bills*, 9 Metc. 1 (1845); *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126 (1874); *Leslie v. Wabash &c. R. R. Co.*, 88 Mo. 50 (1885); *New Jersey Traction Co. v. Gardner*, 29 Vr. 176 (1895); *Smith v. Chicago &c. R. R. Co.*, 108 Mo. 243 (1891); *Baltimore City Passenger Ry. Co. v. Nugent*, 86 Md. 349 (1897); *Connells v. Chesapeake*

² *Readhead v. Midland Ry. Co., L. R.*, 2 Q. B. 412 (1867); 4 id. 379 (1869); *Indianapolis &c. R. R. Co. v. Horst*, 93 U. S. 291 (1876). *Case of a landslide in a railway cut. Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435 (1890); *Montgomery &c. Ry. Co. v. Mallette*, 92 Ala. 209 (1890); *George v. St. Louis &c. Ry. Co.*, 34 Ark. 613 (1879); *St. Louis &c. Ry. Co. v. Sweet*, 60 id. 550 (1895); *Boyce v. California Stage Co.*, 25 Cal. 460 (1864); *Treadwell v. Whittier*, 80 id. 574 (1889); *McCurrie v. Southern Pacific Co.*, 122 id. 558 (1898); *Kansas Pa-*

should not relax it, especially when the powerful and dangerous agencies of steam, electricity or compressed air are used as a motive power. The California Civil Code³ provides that they shall use "the utmost care and diligence" for their safe carriage. The Georgia Code provides that a "carrier of passengers is bound to extraordinary diligence" for the safety of passengers.⁴ This rule requiring the highest degree of care applies to passengers on mixed or freight trains.⁵ While it is

cific Ry. Co. v. Miller, 2 Colo. 442 (1874); Fuller v. Naugatuck R. R. Co., 21 Conn. 557 (1852); Chicago &c. R. R. Co. v. Pillsbury, 123 Ill. 9 (1887); Louisville &c. Ry. Co. v. Snyder, 117 Ind. 435 (1888); Union Pacific Ry. Co. v. Hand, 7 Kan. 380 (1871); Baltimore City Passenger Ry. Co. v. Nugent, 86 Md. 349 (1897); Ingalls v. Bills, 9 Metc. 1 (1845); McElroy v. Nashua &c. R. R. Co., 4 Cush. 400 (1849); Simmons v. New Bedford &c. Steamboat Co., 97 Mass. 361 (1867); Dodge v. Boston &c. Steamship Co., 148 Mass. 207, 218 (1889); Furnish v. Missouri Pacific Ry. Co., 102 Mo. 438 (1890); Smith v. Chicago &c. R. R. Co., 108 id. 243 (1891); Palmer v. Delaware &c. Canal Co., 120 N. Y. 170 (1890), affirming 46 Hun, 486; Carroll v. Staten Island R. R. Co., 58 id. 126 (1874); Taylor v. Grand Trunk Ry. Co., 48 N. H. 304 (1869); Sullivan v. Philadelphia &c. R. R. Co., 30 Pa. St. 234 (1858). In a recent New York case this rule is said to exist only with respect to those results which are naturally to be apprehended from unsafe roadbeds, defective machinery, imperfect cars and other conditions endangering the success of the undertaking. Stierle v. Union Ry. Co., 156 N. Y. 70, 73 (1898); Nashville &c. R. R. Co. v. Jones, 9 Heisk. 27 (1871). The rule was applied to protecting passengers from injuries by the

negligent and careless use of a loaded gun exhibited by another passenger. Ferry Companies v. White, 99 Tenn. 256 (1897); Baltimore &c. R. R. Co. v. Wightman, 29 Gratt. 431 (1877); Connells v. Chesapeake &c. Ry. Co., 93 Va. 44 (1896); Searle v. Kanawha &c. Ry. Co., 32 W. Va. 370 (1889). "The utmost care and diligence;" "The highest degree of care and diligence," defined in Heucke v. Milwaukee City Ry. Co., 69 Wis. 401, 408 (1887). Such is the universal doctrine of the courts and text writers. Ray on Negligence of Imposed Duties, chap. 4, § 65; Hutchinson on Carriers, §§ 503, 799-801; Cooley on Torts (2d ed.), 768, 769; Thompson on Carriers of Passengers, p. 175 *et seq.*; 2 Wood Ry. Law, p. 1095; Story on Bail., § 601; Shearm. & Redf. on Neg. (5th ed.), § 495; 5 Am. & Eng. Ency. of Law (2d ed.), p. 558; 6 id., p. 236.

³ Code, § 2100; Fisher v. Southern Pacific R. R. Co., 89 Cal. 399 (1891).

⁴ Code, § 2067; Alabama &c. Ry. Co. v. Coggins, 88 Fed. Rep. 455 (1898).

⁵ Chicago &c. R. R. Co. v. Arnol, 144 Ill. 261 (1893); New York &c. R. R. Co. v. Blumenthal, 160 id. 40 (1896); Missouri Pacific Ry. Co. v. Holcomb, 44 Kan. 332 (1890); Ohio Valley Ry. Co. v. Watson, 93 Ky. 654 (1893).

said that the "utmost care" and the "highest degree of diligence" are to be exercised, it is to be understood that the care and diligence exacted are not such as will exclude all possible peril, or required to be of that degree that will render the use of the instruments of transportation, known to be employed, impracticable. But it always has relation to the mode of conveyance accepted and used, and the conditions and circumstances necessarily attendant.⁶ They are liable for the slightest negligence causing injury to their passengers.⁷ The reason for the rule is, that a neglect of duty in such cases is likely to result in such fatal consequences, such as great bodily harm or loss of life to those who are compelled to use such means of conveyance. As the result of the least negligence may be of so fatal a nature, the duty of vigilance, imposed by law on the part of the carrier, requires the exercise of the utmost care, so far as human skill, experience and foresight can go, in order to prevent or guard against accident.⁸ The fact that a carrier is financially embarrassed is no excuse for relaxing

⁶ *Chicago &c. R. R. Co. v. Arnol*, 144 Ill. 261, 272 (1893); *Dodge v. Boston &c. Steamship Co.*, 148 Mass. 218 (1889).

Whenever the company receives passengers upon freight trains and collects fare from them, although it is done in violation of a rule of the company, the corporation incurs the same liability for his safety as if he were in their regular passenger train. *Beach on Cont. Neg.* (3d ed.), § 154; *International &c. R. R. Co. v. Irvine*, 64 Tex. 529 (1885); *Whitehead v. St. Louis &c. Ry. Co.*, 99 Mo. 263 (1889); *Dunn v. Grand Trunk Ry. Co.*, 58 Me. 187 (1870); *Lawrenceburg &c. R. R. Co. v. Montgomery*, 7 Ind. 474, 476 (1856); *Creed v. Pennsylvania R. R. Co.*, 86 Pa. St. 139 (1878); *Edgerton v. New York &c. R. R. Co.*, 39 N. Y. 227 (1868); *Lucas v. Milwaukee &c. R. R. Co.*, 33 Wis. 41 (1873); *Ohio &c. R. R. Co. v. Mubling*, 30 Ill. 9 (1861).

⁷ *Louisville &c. Ry. Co. v. Snyder*, 117 Ind. 435 (1888); *Baltimore &c. R. R. Co. v. Wightman*, 29 Gratt. 431 (1877); *Boyce v. California Stage Co.*, 25 Cal. 460, 468 (1864); *Furnish v. Missouri Pacific Ry. Co.*, 102 Mo. 438 (1890); *Heucke v. Milwaukee City Ry. Co.*, 69 Wis. 401 (1887); *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890 (1893). What degree of care the common carrier must observe for the safety of a passenger on its trains, to exonerate it from liability for injury, is a question of law. *Chicago &c. R. R. Co. v. Pillsbury*, 123 Ill. 9 (1887).

⁸ *Kelly v. Manhattan Ry. Co.*, 112 N. Y. 443, 450 (1889); *Moreland v. Boston &c. R. R. Co.*, 141 Mass. 31 (1886). For carrier's liability for injuries happening to passengers beyond carrier's line, see *Shearm. & Redf. on Neg.* (5th ed.), § 503.

the severity of the rule.⁹ The standard of care and diligence required by the law does not depend upon the common carrier's pecuniary condition nor the amount of its earnings.¹⁰

§ 28. **Liability is independent of contract.**—The duty of common carriers, engaged in the public employment, to safely and securely carry, is independent of contract. It is a duty imposed by law from considerations of public policy. It arises from the fact that persons or property are received in the course of the business of such employments.¹¹ Nor do the obligations and liabilities depend upon statute.¹² The rule of law has its foundation deep in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice.¹³

§ 29. **Liability of street railway companies to passengers—Starting and stopping.**—The same duty, obligations and liabilities are imposed upon street railway companies for the safe carriage of their passengers as are imposed upon steam railroads.¹⁴ A different rule is applied to steam railroads starting and stopping their trains at stations, and to street railway companies stopping and starting to take on and let off passen-

⁹ Taylor v. Grand Trunk Ry. Co., Ry. Co. v. McClellan, 54 Neb. 672 48 N. H. 304, 317 (1869). (1898); Wynn v. Central Park &c.

¹⁰ *Ib.* R. R. Co., 38 N. Y. St. Rep. 181

¹¹ Delaware &c. R. R. Co. v. R. R. Co., 38 N. Y. St. Rep. 181 Trautwein, 23 Vr. 169 (1889); Carroll v. Staten Island R. R. Co., 58 N. Y. 126 (1874); Austin v. Great Western Ry. Co., L. R., 2 Q. B. 442 (1867); Foulkes v. Metropolitan Dist. Ry. Co., L. R., 5 C. P. D. 157, 169 (1880); 4 id. 267; Shearm. & Redf. on Neg. (5th ed.), § 486.

¹² Hannibal &c. R. R. Co. v. Swift, 12 Wall. 262 (1870); Philadelphia &c. R. R. Co. v. Derby, 14 How. 468, 485 (1852).

¹³ Indianapolis &c. R. R. Co. v. Horst, 93 U. S. 291, 296 (1876).

¹⁴ Citizens Street Ry. Co. v. Twi-name, 111 Ind. 587 (1887); Smith v. St. Paul City Ry. Co., 32 Minn. 1 (1884); Watson v. St. Paul City Ry. Co., 42 id. 46 (1889); Lincoln Street Ry. Co. v. McClellan, 54 Neb. 672 (1898); Wynn v. Central Park &c. R. R. Co., 38 N. Y. St. Rep. 181 (1891); Stierle v. Union Ry. Co., 156 N. Y. 70 (1898); Topeka City Ry. Co. v. Higgs, 38 Kan. 375 (1888); O'Connell v. St. Louis Cable &c. Ry. Co., 106 Mo. 482 (1891); Bonce v. Dubuque Street Ry. Co., 53 Iowa, 278 (1880); Heucke v. Milwaukee City Ry. Co., 69 Wis. 401 (1887); Denver Tramway Co. v. Reid, 4 Col. App. 53 (1893); Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890 (1893); Cronan v. Crescent City R. R. Co., 49 La Ann. 65 (1897); Atlanta Consolidated Street Ry. Co. v. Bates, 103 Ga. 333 (1897); Ray on Negligence of Imposed Duties, chap. 111; Thompson on Carriers of Passengers, 26, 442; Hutchinson on Carriers, § 500 *et seq.*

gers. On the ordinary railroads operated by steam power, and stopping at regular stations, the conductor in charge of a train is only required to stop a sufficient time to allow passengers an opportunity to alight by the exercise of reasonable diligence, and, having so waited, is not guilty of negligence in putting the train in motion again, while a passenger is in the act of alighting, or otherwise in a dangerous position, unless he knew the fact at the time, or ought to have known it. But this principle does not apply to the driver or motor-man of a street railway car drawn by horses, or propelled by electricity, whose duty it is, when signalled to stop, not only to stop a reasonable time for passengers to alight, but to see and know, before starting again, that no one is in the act of alighting, or in any other perilous position. If injury is done to a passenger while alighting from the car by starting the same, it is such a failure of duty as renders the company liable.¹⁵

§ 30. Liability of common carriers for injuries at depots, stations and platforms.—Common carriers are bound simply to exercise ordinary care over the approaches to the cars, such as depots, stations, platforms, halls, stairways and the like, in view of the dangers to be apprehended.¹⁶ They are not held to

¹⁵ *Birmingham Union Ry. Co. v. Smith*, 90 Ala. 60 (1890); *id.* 8. See *Mass. 31* (1886); *Pendleton Street R. R. Co. v. Shires*, 18 Ohio St. 255 (1868); *Beard v. Connecticut &c. R. R. Co.*, 48 Vt. 101 (1875); *St. Louis &c. Ry. Co. v. Fairbairn*, 48 Ark. 491 (1886); *Moses v. Louisville &c. R. R. Co.*, 39 La. Ann. 649 (1887); *Buenennann v. St. Paul &c. Ry. Co.*, 32 Minn. 390 (1884); *McKone v. Michigan Cent. R. R. Co.*, 51 Mich. 601 (1883); *Cross v. Lake Shore &c. R. R. Co.*, 69 id. 363 (1888); *Moore v. Wabash &c. R. R. Co.*, 84 Mo. 481 (1884); *Ray on Negligence of Imposed Duties*, § 33; *Shearm. & Redf. on Neg. (5th ed.)*, §§ 501, 506; *Exton v. Central R. R. Co.*, 33 Vr. 7 (1898); *Pennsylvania Co. v. Marion*, 104 Ind. 239 (1885); *More-*

that high degree of care which the law requires them to exercise over the roadbed, machinery and appliances, when in operation, for the safety of the passenger, while in the actual progress of his journey; and this for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to in such cases are naturally of a much less serious nature.¹⁷ A passenger walking on a railroad station platform, in order to enter his train, is not bound to exercise any more care than the law requires in a place presumed to be safe.¹⁸ To establish a case of negligence for an alleged defectiveness in a structure for the use of passengers, such as a platform or the like, it must be proved that it was an improper one for its purpose. It is not sufficient to show that by some alterations it might have been made safer.¹⁹ Overcrowding the platform of an elevated station whereby injury is caused to passengers about to board a train, is actionable;²⁰ but negligence in such a case is a question for the jury.²¹ A railroad company owes no duty with respect to the safety of its depot platforms and waiting-rooms, to those who visit its premises out of idle curiosity,²² but to abstain from gross and wanton negligence, which is equivalent to intentional mischief.²³

§ 31. Liability of common carriers to strangers and trespassers.

— The common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, especially to trespassers, that it is in guarding against injuries to passengers.²⁴ But such a person cannot

¹⁷ *Kelly v. Manhattan Ry. Co.*, 112 N. Y. 443, 450 (1889). See *Alabama &c. Ry. Co. v. Coggins*, 88 Fed. Rep. 455 (1898); *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169 (1898).

¹⁸ *Ayres v. Delaware &c. R. R. Co.*, 158 N. Y. 254 (1899).

¹⁹ *Crafter v. Metropolitan Ry. Co.*, L. R., 1 C. P. 300 (1866); *Toomey v. Brighton &c. Ry. Co.*, 3 C. B. (N. S.) 146 (1857).

²⁰ *McGearty v. Manhattan Ry. Co.*, 15 App. Div. 2; 43 N. Y. Supp. 1086 (1897).

²¹ *Ib.*

²² *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129 (1868); *Burbank v. Illinois Cent. R. R. Co.*, 42 La. Ann. 1156 (1890); *Heinlein v. Boston &c. R. R. Co.*, 147 Mass. 136 (1888).

²³ *Burbank v. Illinois Cent. R. R. Co.*, 42 La. Ann. 1156 (1890); *Whart. on Neg.* 822.

²⁴ *Chicago &c. R. R. Co. v. Mehl-sack*, 131 Ill. 61 (1889); *Snyder v. Natchez &c. R. R. Co.*, 42 La. Ann. 302 (1890); *Leonard v. Boston &c. R. R. Co.*, 170 Mass. 318 (1898).

be treated in a willful, wanton, or malicious manner.²⁵ To entitle the plaintiff, who was a trespasser, to recover damages against a railroad company, he must prove either a wanton and willful injury by the defendant company, or that after discovering the plaintiff's perilous position the company did not exercise ordinary care to avoid the accident.²⁶

§ 32. **Contractors—Statutes.**—It is a settled principle in the law of negligence, declared in a multitude of cases, and applied to a great variety of circumstances, that where a person or corporation exercising an independent employment, enters into a contract with another, as an independent contractor, to execute the subject-matter of the contract, the contractor alone is liable for injuries arising from the negligence of himself or his servants.²⁷ There are well-understood and defined exceptions to this rule of exemption: *First*: When the subject-matter of the contract is unlawful. *Second*: When a statutory duty is imposed upon individuals or corporations. *Third*: When the contract provides for the doing of an act which, when performed, will create a nuisance.²⁸ *Fourth*: When the thing to be done, however skillfully and carefully performed, is intrinsically dangerous.²⁹ This principle is

²⁵ Atchison &c. R. R. Co. v. his own right and for himself, Gants, 38 Kan. 608 (1888); Louisville &c. R. R. Co. v. Johnson, 92 Ala. 204 (1890); Chicago &c. R. R. City of Detroit v. Corey, 9 Mich. Co. v. Mehlsack, 131 Ill. 61 (1889); 184 (1861).

²⁶ Snyder v. Natchez &c. R. R. Co., 42 La. Ann. 302 (1890); Condran v. Chicago &c. Ry. Co., 67 Fed. Rep. 522 (1895); 14 C. C. A. 506. See Pierce on Railroads, p. 330; Hutchinson on Carriers, p. 447.

²⁷ Peirce v. Walters, 164 Ill. 560 (1897).

²⁸ Thomas on Neg., p. 343; Cooley on Torts, 548; Shearm. & Redf. on Neg. (5th ed.), § 164; Cuff v. New-ark &c. R. R. Co., 6 Vr. 17, 574 (1870); Berg v. Parsons, 156 N. Y. 109 (1898). The difference between a contractor and an agent or servant is, that a contractor acts in

²⁸ Engel v. Eureka Club, 137 N. Y. 100, 104 (1893); Peachey v. Row-land, 13 C. B. 182 (1853); Ellis v. Sheffield Gas Co., 2 El. & B. 767 (1853); Evans v. Murphy, 87 Md. 498 (1898); Smith v. Benick, 87 id. 610 (1898). See Shearm. & Redf. on Neg. (5th ed.), §§ 176, 298.

²⁹ 2 Dillon on Mun. Corp., § 1029; Mayor &c. of Birmingham v. McCary, 84 Ala. 469 (1887). Or where the employer personally inter-feres with the work. Berg v. Parsons, 156 N. Y. 109 (1898). It is also held that there must be due care in selecting the contractor.

based upon the reason that the contractor alone has the right to direct and control the manner of performing the work and the servants hired by him in its execution. This is also made the test in some courts,³⁰ by which to determine whether the one performing the work is an independent contractor or simply a servant or agent. "The true test of a 'contractor' would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished."³¹

§ 33. **Electricity and electrical appliances.**—In supplying and handling electricity "very great care" to prevent injury is required.³² "It is due to the citizens that electric companies that are permitted to use for their purposes the streets of a city or town shall be required to exercise the utmost degree of care in the construction, inspection and repair of their wires and poles, to the end that travellers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it.

Norwalk &c. Co. v. Borough of Norwalk, 63 Conn. 395 (1893). See Berg v. Parsons, 84 Hun, 60 (1895); Am. L. Rev. for March-April, 1895, p. 229.

³⁰ Larson v. Metropolitan Street Ry. Co., 110 Mo. 234 (1892).

³¹ Shearm. & Redf. on Neg. (5th ed.), § 164. Approved in Hexamer v. Webb, 101 N. Y. 377, 385 (1886); Cunningham v. International R. R. Co., 51 Tex. 503, 510 (1879); Robinson v. Webb, 11 Bush, 464 (1875).

The Georgia statute provides that an employer is liable for the acts of a contractor: (1) when the work is wrongful in itself, or if done in the ordinary manner, would result in a nuisance; (2) or if, according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed; (3) or if the wrongful act

is the violation of a duty imposed by express contract upon the employer; (4) or if the wrongful act is the violation of a duty imposed by statute; (5) or if the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant, or so that an injury results which is traceable to his interference; (6) or if the employer ratifies the unauthorized way of the independent contractor. Code of Ga. (vol. 2), 1895, § 3819.

³² Giraudi v. Electric Imp. Co., 107 Cal. 120, 124 (1895). See Myhan v. Louisiana Electric Light &c. Co., 41 La. Ann. 964 (1889); Ennis v. Gray, 87 Hun, 355 (1895); 10 Am. & Eng. Ency of Law (2d ed.), p. 869.

* * * All the reasons that support the rigid enforcement of this rigid rule against the carriers of passengers by steam, apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity or liable to become so charged. The requirement does not carry with it too heavy a burden."³³ It is negligence to allow a wire liable to become charged with electricity to hang in or over a street or sidewalk at such a height as to obstruct or endanger ordinary travel.³⁴

§ 34. **Elevators.**—The same duty, obligations and liabilities as to care, skill and diligence are imposed, by law, upon the owners and managers of a passenger elevator, as upon a common carrier of passengers, for the protection of the passengers in it, and to guard against injuries to them.³⁵ The owner of a passenger elevator in a building which is run for the use of those persons invited to enter the building, becomes a common carrier, and is charged with the highest degree of care which human foresight can suggest, both as to machinery and appliances and the conduct of the servants.³⁶ They are liable for

³³ Burwell, J., in *Haynes v. Clede Gas Light Co.*, 145 Mo. 502 (1898); *Newark Electric Light & Co. v. Ruddy*, N. J. (1898); 5 *Am. Neg. Rep.* 402, where a list of recent cases will be found in which injuries were sustained from contact with electric wires.

³⁵ *Goodsell v. Taylor*, 41 Minn. 207 (1889); *Treadwell v. Whittier*, 80 Cal. 574 (1889). See *Hodges v. Percival*, 132 Ill. 53 (1890); *Lee v. Publishers' Co.*, 55 Mo. App. 390 (1893); *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222 (1898); *Shearm. & Redf. on Neg.* (5th ed.), § 719a; *Alb. L. J.*, Nov. 23, 1889, p. 417; *Thomas on Neg.* 560; 10 *Am. & Eng. Ency. of Law* (2d ed.), p. 944.

³⁶ *Marker v. Mitchell*, 54 Fed. Rep. 637 (1893); 10 C. C. A. 306; *Treadwell v. Whittier*, 80 Cal. 574 (1889); *Goodsell v. Taylor*, 41 Minn. 207 (1889); *Kentucky Hotel Co. v. Camp*, 97 Ky. 424 (1895); *Field v. French*, 80 Ill. App. 78 (1898).

³⁴ *Ahern v. Oregon Tel. Co.*, 24 Or. 276 (1893); *Gannon v. La-*

the slightest negligence causing injury to their passengers.³⁷ The falling of an elevator affords *prima facie* evidence of negligence.³⁸ In some States the operation of elevators is regulated by statute.³⁹ An omission to comply with the requirements of the statute is *prima facie* evidence of negligence.⁴⁰

§ 35. **Domestic animals.**—Generally it is said to be well established that the owner of a vicious dog, is liable for any injury committed by the dog, if he had previous knowledge of its vicious propensities.⁴¹ This is true when the animal is permitted to go at large. The owner's liability does not depend upon negligence, because in such cases it is a willful wrong to permit a vicious animal to wander at will.⁴² For injuries committed by animals, the owner is only liable for his negligence in permitting, or suffering such injuries to be committed.⁴³ He is only answerable for the want of ordinary care.⁴⁴ Thus, the owner of a dog is not liable for the damages

³⁷ *Oberfelder v. Doran*, 26 Neb. 118 (1889); *Kentucky Hotel Co. v.* 205 (1898).

Camp, 97 Ky. 424 (1895). See *McGrell v. Buffalo Office Building Co.*, 153 N. Y. 265 (1897); *Shattuck v. Rand*, 142 Mass. 83 (1886); *Colorado Mortg. &c. Co. v. Rees*, 21 Colo. 435 (1895); *Amerine v. Porteous*, 105 Mich. 347 (1895); *Obersdorfer v. Pabst*, 100 Wis. 515 (1898). Injury to servants. *Strawbridge v. Bradford*, 128 Pa. St. 200 (1889); *Bier v. Standard Mfg. Co.*, 130 id. 446 (1889). Effect of public inspection of elevators on masters' duty to servants. *McGregor v. Reid &c. Co.*, 178 Ill. 464 (1899).

³⁸ *Goodsell v. Taylor*, 41 Minn. 207 (1889); *Treadwell v. Whittier*, 80 Cal. 574 (1889); *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222 (1898).

³⁹ *New York Laws of 1874*, chap. 547, § 5.

⁴⁰ *McRickard v. Flint*, 114 N. Y. 222 (1889). See *Malloy v. New*

Hilliard on Torts, 644; 1 Add. on Torts (Wood's ed.), §§ 261, 262; *Perkins v. Mossman*, 15 Vr. 579 (1882); *Roehers v. Remhoff*, 26 id. 475 (1893).

⁴² *Shearm. & Redf. on Neg.* (5th ed.), § 628; *Lynch v. McNally*, 73 N. Y. 347 (1878); 7 *Daly*, 126; *Muller v. McKesson*, 73 N. Y. 195 (1878); 2 *Am. & Eng. Ency. of Law* (2d ed.), p. 351.

⁴³ *Shearm. & Redf. on Neg.* (5th ed.), § 626; *Thomas on Neg.* 506; *Van Leuven v. Lyke*, 1 N. Y. 515 (1848); *Dolfinger v. Fishback*, 12 Bush, 474 (1876); *Woodbridge v. Marks*, 17 App. Div. 139 (1897); 45 N. Y. Supp. 156.

⁴⁴ *Shearm. & Redf. on Neg.* (5th ed.), § 626; *Meredith v. Reed*, 26 Ind. 334 (1866); *Georgia Code*, § 2964; *Conway v. Grant*, 88 Ga. 40 (1891).

caused by the dog, though he knows he is vicious, if he exercise proper care and diligence to secure him, so that he will not injure any one who does not unlawfully provoke or intermeddle with him.⁴⁵

§ 36. **Negligent use of firearms.**—When one makes use of loaded weapons, he is responsible only as he might be for any negligent handling of dangerous machinery, that is to say, for care proportioned to the danger of injury from them. The firing of guns for sport or exercise is not unlawful if a suitable place is chosen for the purpose, but in the streets of a city, or in any place where many persons are congregated it might be negligence.⁴⁶ Mr. Justice Scudder, of the Supreme Court of New Jersey, said: "The duty which a person, lawfully carrying firearms, owes to others is not different from that which is imposed on all who have control of any hurtful thing, except in the degree of care to be exercised. As firearms are more than ordinarily dangerous when loaded, those who handle them are bound to use more than ordinary care to prevent injury to others. * * * Each case must stand upon its own peculiar facts, and rational rather than distinctively legal conclusions must usually be drawn from them."⁴⁷ Thus where

⁴⁵ *Worthen v. Love*, 60 Vt. 285 (1888). Draft horse. *Reed v. Southern Express Co.*, 95 Ga. 108 (1894). Unaltered mule, decided under *Sand & H. Dig.*, § 7301; *Briscoe v. Alfrey*, 61 Ark. 196 (1895). *Moysiakan v. Wheeler*, 117 N. Y. 285 (1889); *Brice v. Bauer*, 108 id. 428 (1888). Liability of owner of dog for injury, under Iowa Code, § 1485; *Schultz v. Griffith*, 103 Iowa, 150 (1897).

"To charge the owner of an animal for an injury committed by it when not trespassing, it is necessary, at common law, to allege and prove that he had previous notice that its disposition was such as to make it probable that it would commit injuries of a similar character, and that he failed to take

proper precautions against such acts on its part." *Shearm. & Redf. on Neg.* (5th ed.), § 628, and cases cited; *Earhart v. Youngblood*, 27 Pa. St. 331 (1856); *Finney v. Curtis*, 78 Cal. 498 (1889); *Meegan v. McCow*, 1 Okl. 59 (1892); *Norris v. Warner*, 59 Ill. App. 300 (1894); *Cuney v. Campbell*, Minn. ; 6 Am. Neg. Rep. 97 (1899). In England and many of the States the common-law rule requiring an averment and proof of *scienter* as against owners of dogs has been modified by statute.

⁴⁶ *Cooley on Torts*, p. 593; *Conradt v. Clauve*, 93 Ind. 476 (1883).

⁴⁷ *Moebus v. Becker*, 17 Vr. 41, 44 (1884). See *Hankins v. Watkins*, 77 Hun, 360 (1894); 28 N. Y. Supp. 867.

the defendant fired a pistol, shooting at a mark, and the ball glanced and hit the plaintiff, it was found that the injury was unintentional, but was the result of gross and culpable carelessness on the defendant's part, it was held that the action of trespass *vi et armis* would lie.⁴⁸ On the other hand, one hunting in a wilderness need not expect the presence of another within range of his gun, and if such be the case and unintentional injury results, the huntsman is not liable.⁴⁹ Where one of two hunters is walking in advance of the other, the latter is bound to so carry his gun that in the event of its accidental discharge the former will not be injured. The duty of each is to watch his own gun, not the guns of those behind him.⁵⁰ So it is actionable negligence for one, while adjusting the hammer of a loaded revolver, to hold it so that an accidental discharge would injure another.⁵¹ If a person is injured by the discharge of firearms in the hands of another, who has entire control of them, the burden is cast upon the latter to prove that the gun or revolver was not fired at the former either intentionally or negligently, but the result was inevitable and without the least fault upon his part.⁵²

⁴⁸ Welch v. Durand, 36 Conn. 182 (1869). not apply. Sutton v. Bonnett, 114 Ind. 243 (1887).

⁴⁹ Whitten v. Hartin, 163 Mass. 39 (1895); Thomas on Neg. 676; Shearm. & Redf. on Neg. (5th ed.), § 686. In Kentucky the statute provides "that the widow and minor child or children of a person killed by the careless, wanton, or malicious use of firearms, or by any weapon

⁵⁰ Winans v. Randolph, 169 Pa. St. 606 (1895). See McCleany v. Frantz, 160 id. 535 (1894). popularly known as "Colts," "brass knucks," or "slung shots,"

⁵¹ Judd v. Ballard, 66 Vt. 668 (1894). or other deadly weapons not in self-defense, may have an action

⁵² Atchison v. Dullam, 16 Ill. App. 42 (1884). In Indiana the act of March 5, 1883, p. 107, concerning the use of firearms, makes criminal the pointing of a gun or other firearm at another purposely, whether it be done with wicked intent or in mere foolishness. Lange v. State, 95 Ind. 114 (1883). But where the weapon is accidentally, and not purposely, pointed at another, the statute does

against the person or persons who committed the killing." Gen. Stats., chap. 1, § 6. See Bethel v. Otis, 92 Iowa, 502 (1894); Knott v. Wagner, 16 Lea, 481 (1886). One who snaps a gun knowing it to be pointed at another person is guilty of negligence *per se* and is liable to such person in damages, both at common law and under the statute. Bahel v. Manning, 112 Mich. 24 (1897).

§ 37. **Explosion of fireworks.**—Mr. Thomas in his work on Negligence says: “The explosion of fireworks in a public street, without proper legislative or municipal authority, is wrongful, and the wrongdoer is liable for an injury happening therefrom to persons or property.”⁵³ If a municipality by ordinance assumes to authorize the display of fireworks at places and under circumstances dangerous to persons and property, it may be liable for damages resulting therefrom to persons not participating therein, without other evidence of negligence or wrong;⁵⁴ a person placing himself in proximity to an unlawful display, to watch the same, may recover for injury without evidence of negligence in the conduct of the same, or in the use of dangerous materials.”⁵⁵ One firing a gun or exploding fire-crackers in a street, thereby frightening horses, is liable either to the owner of the horse,⁵⁶ or to any person whom the frightened horse may have injured.⁵⁷

§ 38. **Liability of those engaged in games and sports.**—One inflicting an injury while engaged in a game or sport is liable for such injury if it was intentional,⁵⁸ but if the injury was inflicted in good faith and within the rules of the game, it is not actionable.⁵⁹

⁵³ Thomas on Neg., p. 679; Mo. 653 (1889). *Contra*, Scanlon v. Whart. on Neg., § 181; Conklin v. Wedger, 156 Mass. 462 (1892). Case Thompson, 29 Barb. 218 (1859); of fireworks, See Warxel v. Harrison, 37 Ill. App. 323 (1890).

§ 688. Squib thrown from person to person liable to any one alternately injured by its explosion. ⁵⁶ Cole v. Fisher, 11 Mass. 137 (1814); Conklin v. Thompson, 29 Barb. 218 (1859).

Scott v. Shepard, 2 W. Blackst. 892 (1773); 3 Wils. 403.

⁵⁴ Thomas on Neg., p. 679; Speir v. City of Brooklyn, 139 N. Y. 6 (1893). *Contra*, Fifield v. City of Phoenix, 36 Pac. Rep. 916 (Ariz. 1894); Bartlett v. Town of Clarksburg, W. Va. (1898); 5 Am. Neg. Rep. 492.

⁵⁵ His mere presence as a spectator does not make him a joint wrongdoer. Thomas on Neg., p. 679; Colvin v. Peabody, 155 Mass. 104 (1891); Dowell v. Guthrie, 99

⁵⁷ Conklin v. Thompson, 29 Barb. 218 (1859); S. P., Lowery v. Manhattan Ry. Co., 99 N. Y. 158 (1885); Lee v. Union R. R. Co., 12 R. I. 383 (1879); Piollet v. Simmers, 106 Pa. St. 95 (1884).

⁵⁸ Cooley on Torts, § 163.

⁵⁹ Whart. on Neg. 111; Thomas on Neg. 681. Engaged in a “rush” or “horse game.” Markley v. Whitman, 95 Mich. 236 (1893). Defense that the act he did was by way of a joke. Wartman v. Swindell, 25 Vr. 589 (1892).

§ 39. **Infants, idiots and lunatics.**—Infants, idiots and lunatics⁶⁰ are liable for their torts in the same manner as adults.⁶¹ An injury might probably be considered an unavoidable accident in the case of infants, which would not be so considered in the case of adults.⁶² The law looks to the person damaged by another and seeks to make him whole without reference to the condition mental or physical, of the person causing the damage.⁶³

§ 40. **Parents not liable for torts of infants — Statutes.**—A parent is not liable for the torts of his infant child, not done by his authority;⁶⁴ such as injury done with guns given by the parent to the child.⁶⁵ But in Georgia it is provided by statute that every person shall be liable for torts committed by his child.⁶⁶

⁶⁰ Reeves on Domestic Relations, p. 386; Schouler on Domestic Relations, § 253; Bullock v. Babcock, 3 Wend. 391 (1829); Sikes v. Johnson, 16 Mass. 389 (1820); Conklin v. Thompson, 29 Barb. 218 (1859); Conway v. Reed, 66 Mo. 346 (1877); Campbell v. Stakes, 2 Wend. 137 (1828); Tift v. Tift, 4 Den. 175 (1847).

⁶¹ 1 Chit. Pl. 66; Morain v. Devlin, 132 Mass. 87 (1881).

⁶² Bullock v. Babcock, 3 Wend. 391 (1829). On the question of the contributory negligence of a young child the New York Court of Appeals said: In administering civil remedies the law does not fix any arbitrary period when an infant becomes *sui juris*; when the inquiry is material it becomes a question of fact for the jury, unless the child is of so very tender years that the court can safely decide. Stone v. Dry Dock & C. R. R. Co., 115 N. Y. 104 (1889).

⁶³ Williams v. Hays, 143 N. Y. 442, 446 (1894); 157 id. 541 (1899).

⁶⁴ Chaddock v. Plummer, 88 Mich. 225 (1891); Harris v. Cameron, 81 Wis. 239 (1892); Haggerty v. Powers, 66 Cal. 368 (1885); Tift v. Tift, 4 Den. 175 (1847); Baker v. Haldeman, 24 Mo. 219 (1857).

In Mississippi it was held that a parent is not civilly liable to a child for personal injuries inflicted during minority and while the relation of parent and child with its natural obligations exist. Hewlett v. Ragsdale, 68 Miss. 703 (1891). That was a suit by a child against her mother to recover damages for having willfully, illegally and maliciously caused a minor daughter to be imprisoned for ten days in an insane asylum. *Ib.*

⁶⁵ Chaddock v. Plummer, 88 Mich. 225 (1891); Harris v. Cameron, 81 Wis. 239 (1892). *Contra*, Johnson v. Glidden, S. Dak. (1898); 5 Am. Neg. Rep. 97.

⁶⁶ Code of Ga. (1895), § 3817.

§ 41. Innkeepers — No presumption of negligence from fire.—

An innkeeper is not an insurer of the persons of his guests against injury, his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening to them by his negligence.⁶⁷ No presumption of negligence arises against the owner or occupier of an inn or house in which fire originates.⁶⁸

§ 42. Highways — Abutting owners.—The abutting owner of land fronting on a highway or street owes no duty, as such, to repair any part of the highway, or otherwise make it safe for travel;⁶⁹ he is liable, however, for injuries resulting from obstructions caused or created by him in the adjoining sidewalk, it makes no difference how or in what manner such obstructions were created.⁷⁰ But he is not responsible to individuals for injuries resulting to them from defects or want of repair in the sidewalk;⁷¹ or from accumulations by natural causes, of snow and ice thereon;⁷² or for injuries resulting from obstructions in the way, wholly effected by natural causes;⁷³ although the sidewalk forms part of the highway, and he is obliged by ordinances of the city to keep the sidewalk clear and in good repair.⁷⁴ But he will be liable if he constructs a building by which he directs the natural

⁶⁷ Weeks v. McNulty, 101 Tenn. 495 (1898).

⁶⁸ Weeks v. McNulty, 101 Tenn. 495 (1898). The contrary rule has been pronounced harsh and unreasonable. *Ib.*

⁶⁹ Dillon on Mun. Corp., § 1012; City of Rochester v. Campbell, 123 N. Y. 405 (1890); Weller v. McCormick, 18 Vr. 397 (1885); Kirby v. Boylston Market Assn., 14 Gray, 249 (1859). See Kelly v. Bennett, 132 Pa. St. 218 (1890); Elliott on Streets & Roads, chap. 27.

⁷⁰ Kirby v. Boylston Market Assn., 14 Gray, 249 (1859); Barry v. Terkildsen, 72 Cal. 254 (1887); Flynn v. Canton Co. of Baltimore, 40 Md. 312 (1874). The mere existence of an unsafe condition from ten to twenty minutes of an abut-

ting sidewalk is not sufficient to charge the owner with knowledge of its unsafe condition. Frassi v. McDonald, 122 Cal. 400 (1898).

⁷¹ Kirby v. Boylston Market Assn., 14 Gray, 249 (1859).

⁷² Kirby v. Boylston Market Assn., 14 Gray, 249 (1859); Moore v. Gadsden, 93 N. Y. 12 (1883); Taylor v. Lake Shore & C. R. R. Co., 45 Mich. 74 (1881); City of Hartford v. Talcott, 48 Conn. 525 (1881); Flynn v. Canton Co. of Baltimore, 40 Md. 312 (1874); Norton v. City of St. Louis, 97 Mo. 537 (1888).

⁷³ City of Hartford v. Talcott, 48 Conn. 525 (1881).

⁷⁴ Kirby v. Boylston Market Assn., 14 Gray, 249 (1859); Flynn v. Canton Co. of Baltimore, 40 Md. 312 (1874); Taylor v. Lake Shore

flow of water from his premises upon a sidewalk, where it freezes; to persons who are injured by falling on the ice;⁷⁵ or where snow accumulates on a roof, and does injury by sliding off in a mass;⁷⁶ upon a person travelling with due care on a highway.⁷⁷

§ 43. **Injuries received on streets.**—An unauthorized excavation in the street of a city, for the benefit of adjoining premises, is a nuisance, and all persons who continue, or in any way become responsible for it, are liable, irrespective of any question of negligence.⁷⁸ But if there be permission to make such excavation from the proper municipal authorities, and the act is unskillfully exercised, the rule of liability relaxes its severity and rests upon and is limited by the ordinary principles governing actions for negligence.⁷⁹ Consent may be inferred from acquiescence;⁸⁰ but permission to leave the work in a state dangerous to persons passing, cannot be inferred.⁸¹ It is negligence to leave unprotected, excavations near a street or highway, so that a person, using ordinary care, falls into them;⁸²

&c. *R. R. Co.*, 45 Mich. 74 (1881); *Schaick*, 108 id. 530, 533 (1888); *City of Hartford v. Talcott*, 48 Conn. 525 (1881). *Robbins v. Chicago City*, 4 Wall. 657 (1866); *Gridley v. City of*

Bloomington, 68 Ill. 47 (1873).
⁷⁵ *Lovis v. Eureka Club*, 56 N. Y. Supp. 66 (1899). ⁸¹ *Robbins v. Chicago City*, 4

Wall. 657 (1866).
⁷⁶ *Shipley v. Fifty Associates*, 106 Mass. 194 (1870); *Garland v. Towne*, 55 N. H. 55 (1874). ⁸² *Shearm. & Redf. on Neg.* (5th ed.), §§ 343, 703; *Add. on Torts*, 201.

⁷⁷ *Shipley v. Fifty Associates*, 101 Mass. 251 (1869); *Shearm. & Redf. on Neg.* (5th ed.), § 721. Not liable if not substantially adjoining a public highway. *Hardcastle v. South Yorkshire Ry. Co.*,

⁷⁸ *Irvine v. Wood*, 51 N. Y. 224 (1872); *Congreve v. Morgan*, 18 id. 84 (1858); *Creed v. Hartman*, 29 id. 591 (1864); *Babbage v. Powers*, 130 id. 281 (1891). *4 Hurlst. & N.* 67 (1859). Fourteen inches from the public way. *Hadley v. Taylor*, L. R., 7 C. P. 53 (1865); *Haughey v. Hart*, 62 Iowa, 96 (1883); *City of Norwich v. Breed*,

⁷⁹ *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550 (1884); *Louisville &c. R. R. Co.*, 102 U. S. 577 (1880); *Croghan v. Schiele*, 53 Conn. 186 (1885); *City of Indianapolis v. Emmelman*, 108 Ind. 530 (1886); *Penso v. McCormick*, 125 id. 116 (1890); *Graves v. Thomas*, 95 id. 361 (1883); *Deneck v. Pennsylvania R. R. Co.*, 30 Vr. 415 (1896).
⁸⁰ *Jorgensen v. Squires*, 144 N. Y. 280 (1895); *Babbage v. Powers*, 130 id. 281 (1891); *Jennings v. Van*

or walls or other structures so that they will fall into the street;⁸³ or to permit the falling of a building in the street, in the course of erection.⁸⁴ The falling of signs into a public street is *prima facie* evidence of negligence;⁸⁵ or a bolt from an elevated railroad structure;⁸⁶ or a brick from a railroad bridge over a highway;⁸⁷ or cotton piled on the sidewalk in front of a warehouse, falling and injuring a passer-by;⁸⁸ or bales of hay;⁸⁹ or a stick from an insecure pile of lumber.⁹⁰

§ 44. License to interfere with highways.— One having a license to interfere with the highway from a municipality is liable for the consequences of his negligence.⁹¹ An obligation to keep a street in repair requires that it shall be kept in such condition that the ordinary and expected travel of the locality may pass with reasonable ease and safety. The degree of diligence required of a street railway company either in laying its tracks in the streets of a city or running its cars, depends on the hazards to be encountered, and the consequences to be apprehended from its negligence.⁹² No notice to a railroad company of patent defects in a street connected with the track and caused by the laying of its tracks is necessary, but when it appears that the defects existed and an injury was caused thereby the presumption of negligence is complete. The presumption of knowledge arises from the existence of the de-

⁸³ Rector &c. of the Church of standing upon the sidewalk in front the Ascension v. Buckhart, 3 Hill, of defendant's premises. Denby v. 193 (1842); Mullen v. St. John, 57 Miller, 59 Wis. 240 (1884).

N. Y. 569 (1874); Salisbury v. ⁸⁹ Dehring v. Comstock, 78 Mich. Herchenroder, 106 Mass. 458 (1871). 153 (1889).

⁸⁴ Vincett v. Cook, 4 Hun, 318 ⁹⁰ Holly v. Bennett, 46 Minn. 386 (1875). (1891); Earl v. Crouch, 16 N. Y.

⁸⁵ Morris v. Strobel &c. Co., 81 Supp. 770 (1891); Branson v. Labot, Hun, 1 (1894); St. Louis &c. Ry. Co. 81 Ky. 638 (1884).

v. Hopkins, 54 Ark. 209 (1891). ⁹¹ Shearm. & Redf. on Neg. (5th ed.), § 359.

⁸⁶ Volkmar v. Manhattan Ry. Co., ⁹² Thomas on Neg. 1150, 1151; 134 N. Y. 418 (1892). McMahon v. Second Ave. R. R. Co.,

⁸⁷ Kearney v. London &c. Ry. Co., L. R., 5 Q. B. 411 (1870). Or 75 N. Y. 231 (1878); Worster v. from an abutting house on a person in the street. Murray v. McShane, 52 Md. 217 (1879). Forty-second Street &c. R. R. Co., 50 id. 203 (1872); Schaefer v. City of Fond du Lac, 99 Wis. 333 (1898);

⁸⁸ Maddox v. Cunningham, 68 Thomas v. Consolidated Tract. Co., Ga. 431 (1882). Blocks of wood 33 Vr. 36 (1898).

fects themselves. If circumstances exist showing absence of negligence, as that the defects had not existed for a sufficient length of time to create a presumption of knowledge, or to enable it to repair, it is for the company to prove.⁹³ Whoever, without lawful authority, obstructs a highway so as to render its use hazardous, is liable to one who sustains a special damage thereby.⁹⁴ The liability does not depend upon negligence.⁹⁵

§ 45. Gas companies.— A gas company must use reasonable and ordinary care in planting its pipes and mains, so as to prevent the escape of gas therefrom in dangerous quantities in view of its occupancy of streets for its special and extraordinary use in conducting an article in a high degree inflammable and explosive.⁹⁶ It is bound to use a degree of care and skill proportioned to the danger reasonably to be anticipated, which it is its duty to avoid.⁹⁷ A gas company is not an insurer against explosions of gas carried into buildings by its pipes, but is simply bound, in permitting the gas to be turned into a building, to exercise that degree of care which the nature of the article it deals in, and the consequences to be apprehended from an accident reasonably call for.⁹⁸

§ 46. Temporary use of highways for building or trade.— In reference to the use of streets, Mr. Justice Morton of the

⁹³ *Worster v. Forty-second Street &c. R. R. Co.*, 50 N. Y. 203 (1872).

⁹⁴ *Shearm. & Redf. on Neg.* (5th ed.), § 365; *Dygert v. Schenck*, 23 Wend. 446 (1840); *Barton v. McDonald*, 81 Cal. 265 (1889). Dangerous machinery in an alley, both the abutting owner and municipality are liable. *Osage City v. Larkin*, 40 Kan. 206 (1888).

⁹⁵ *Congreve v. Morgan*, 18 N. Y. 84 (1858).

⁹⁶ *Mississinewa Mining Co. v. Patton*, 129 Ind. 472 (1891). See *Lebanon Natural Gas, Light &c. Co. v. Leap*, 139 Ind. 443 (1894); *Consumers Gas Trust Co. v. Perrego*, 144 id. 350 (1895).

⁹⁷ *Shearm. & Redf. on Neg.* (5th ed.), § 692; *S. P., Holly v. Boston Gas Light Co.*, 8 Gray, 123 (1857); *Washington Gas Light Co. v. Dist. of Columbia*, 161 U. S. 316 (1895). Rule stated in *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355 (1893). Natural gas, decided under § 3561a, Rev. Stats. of Ohio. Liable for damages without proof of negligence. *Gas Fuel Co. v. Andrus*, 50 Ohio St. 695 (1895). Destruction of trees. *Evans v. Keystone Gas Co.*, 148 N. Y. 112 (1895).

⁹⁸ *Schmeer v. Gas Light Co.*, 147 N. Y. 529 (1895); *Pine Bluff &c. Co. v. Schneider*, 62 Ark. 109 (1896); id. 118.

Supreme Court of Massachusetts states the rule to be: "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation, and much on public usage. The general use and the acquiescence of the public is evidence of the right. The owner of land may make such *reasonable* use of a way adjoining his land, as is usually made by others similarly situated. As to the reasonableness of the use, it may well be laid down, that in a populous town where land is very valuable, it is not unreasonable to erect buildings and fences on the line of the street and to place doors and gates in them, so as when opened to swing over the street. When the owner of a lot in such a situation has occasion to build, and for that purpose to dig cellars, he may rightfully lay his building materials and earth within the limit of the street, provided he takes care not improperly to obstruct the same, and to remove them within a reasonable time. It is very obvious that, without this privilege, it would be in some situations nearly or quite impracticable to build at all."⁹⁹ This rule is said to apply to any temporary use of a highway or street that is rendered absolutely necessary from the necessities of trade, commerce or the erection of buildings, that does not necessarily or unreasonably obstruct the same.¹ But a systematic and continued encroachment upon a street, though for the purpose of carrying on a lawful business, is unjustifiable.²

§ 47. Turnpike and plank-road companies — Statutes. — A turnpike or plank-road company is bound to exercise reasonable

⁹⁹ Van O'Linda v. Lothrop, 21 Pick. 292, 297 (1838); Callanan v. Gilman, 107 N. Y. 360 (1887). Or to allow horses and carriages occasionally to stand in such street against or near a house. *Ib.*; Shearm. & Redf. on Neg. (5th ed.), § 361.

¹ Commonwealth v. Passmore, 1 Serg. & R. 217 (1814); People v. Cunningham, 1 Den. 524 (1845); Rex v. Jones, 3 Campb. 230 (1812); Mahar v. Steuer, 170 Mass. 454 (1898); Mills v. City of Philadelphia, 187 Pa. St. 287 (1898); Booth

v. Rome &c. R. R. Co., 140 N. Y. 277 (1893); Jochem v. Robinson, 72 Wis. 199 (1888). But such obstruction must not only be necessary, with reference to the business of the tradesman, it must be reasonable with reference to the rights of the public. Callanan v. Gilman, 107 N. Y. 360 (1887).

² People v. Cunningham, 1 Den. 524 (1845). Obstructions incident to traffic, see Shearm. & Redf. on Neg. (5th ed.), § 362; Elliott on Roads & Streets, 524.

care and diligence to render the ordinary public travel on the road or highway convenient and safe; and if, by the negligence of the company, the road is rendered unsafe, and a traveller exercising ordinary care, sustains damage, the company is liable.³ They are bound to exercise ordinary care and diligence in keeping them in such a state of repair that they may be travelled with safety to life and limb;⁴ for the neglect to perform this duty they are liable at common law to any person who may be aggrieved by such neglect,⁵ without any express statutory provision imposing such liability.⁶ These corporations are *quasi* common carriers—they receive a toll or compensation, and are, therefore, bound to furnish passengers with safe roads and bridges.⁷ The taking of toll from travellers as compensation for the use of the road creates an obligation to maintain every part of the road in a safe condition.⁸ So such companies are liable for leaving piles of stone in the road, which would have a tendency to frighten horses, being of a dangerous character, although not technically a defect or obstruction on the highway, for damages caused to travellers thereby, after notice of its character and neglect to remove the same.⁹ The acquisition by another of the right to use the road will not necessarily relieve from further obligation the one originally liable for nonrepair.¹⁰ In Massachusetts the general statutes respecting turnpike corporations provide that they shall be liable to pay all damages that shall happen to

³ Ireland v. Oswego &c. Plank Road Co., 13 N. Y. 526 (1856).

⁴ Shearm. & Redf. on Neg. (5th ed.), § 385; Townsend v. Susquehanna Turnpike Co., 6 Johns. 90 (1810); Goshen &c. Turnp. Co. v. Sears, 7 Conn. 86 (1828); Baltimore &c. Turnp. Co. v. Cassell, 66 Md. 418 (1886); Brookville &c. Turnp. Co. v. Pumphrey, 59 Ind. 78 (1877); Baltimore &c. Turnp. Road v. Parks, 74 Md. 282 (1891); Speer v. Greencastle &c. Road Co., 4 Ind. App. 525 (1891); Davis v. Lamoille &c. Plank Road Co., 27 Vt. 602 (1855).

⁵ Ward v. Newark &c. Turnpike Co., 1 Spencer, 323 (1844).

⁶ Davis v. Lamoille &c. Plank Road Co., 27 Vt. 602 (1855); Baltimore &c. Turnpike Co. v. Cassell, 66 Md. 418 (1886).

⁷ Freeholders of Sussex County v. Strader, 3 Harr. 108, 122 (1840); Baltimore &c. Turnpike Co. v. Cassell, 66 Md. 418 (1886).

⁸ Baltimore &c. Turnpike Co. v. Cassell, 66 Md. 418 (1886).

⁹ Eggleston v. Columbia Turnp. Road Co., 82 N. Y. 278 (1880).

¹⁰ Shearm. & Redf. on Neg. (5th ed.), § 389; Born v. Allegheny &c. Plank Road Co., 101 Pa. St. 334 (1882); Johnson v. Salem Turnp. &c. Co., 109 Mass. 522 (1872).

any person from the want of repairing their ways.¹¹ It was held that such companies are liable for damages so arising, although their officers or agents had no notice of the want of repair.¹²

§ 48. **Bridges — Statutes.**— At common law, the duty of repairing bridges rested upon the county, where no person or other body was specially charged therewith.¹³ A public bridge constitutes part of the highway upon which it is situate, and a city, by taking charge of and improving the highway, accepts and becomes charged with the maintenance of a bridge constructed thereon by the county.¹⁴ A higher degree of care is due from a toll-bridge company than from one maintaining a free bridge.¹⁵ His liabilities are analogous to the owner of a turnpike road — his obligation is to keep the bridge in proper condition for the safe passage of passengers. This is his duty and he is only liable for negligence.¹⁶ Where a drawbridge is situated partly within the limits of a town and partly within a village, and it is managed and controlled by both, they will be jointly and severally liable for the injuries occasioned by the negligence of their officers in the management of the draw to such bridge.¹⁷ In the United States their maintenance and re-

¹¹ Gen. Stats., chap. 62, § 12.

¹² *Johnson v. Salem Turnpike &c. Co.*, 109 Mass. 522 (1872). See *Davis v. Lamoille Plank Road Co.*, 27 Vt. 602 (1855).

¹³ *Hill v. Board of Suprs. of Livingston Co.*, 12 N. Y. 52 (1854). The statute 22 Henry VIII, chap. 5, affirmed the rule of the common law in this particular. *Ib.* See 4 Am. & Eng. Ency of Law (2d ed.), p. 918.

¹⁴ *City of Goshen v. Myers*, 119 Ind. 196 (1889). See *Stephani v. City of Manitowoc*, 89 Wis. 467 (1895); *Mahnken v. Freeholders of Monmouth*, 33 Vr. 404 (1898).

¹⁵ *St. Louis Bridge Co. v. Miller*, 138 Ill. 465 (1891). See *Orcutt v. Kittery Bridge Co.*, 53 Me. 500 (1866); *Chase v. Cabot &c. Bridge Co.*, 6 Allen, 512 (1863). They

must give notice that there is danger for which they will not be answerable and must refuse to take toll. *Randall v. Cheshire Turnpike*, 6 N. H. 147 (1836). See further on the subject of bridges, *Shearm. & Redf. on Neg.* (5th ed.), chap. 17, §§ 390-397; 4 Am. & Eng. Ency. of Law (2d ed.), pp. 918, 945.

¹⁶ *Griysby v. Chappell*, 5 Rich. L. 443 (1852); *St. Louis Bridge Co. v. Miller*, 138 Ill. 465 (1891). They are not the same as those of common carriers. *Frankfort Bridge Co. v. Williams*, 9 Dana, 403 (1840).

¹⁷ *Weisenberg v. Winneconne*, 56 Wis. 667 (1883). Otherwise when the bridge is between States the authorities of each State are solely liable for nonrepair. *Brown v. Town of Fairhaven*, 47 Vt. 386 (1875).

pair are controlled by statute. It is usually imposed upon the towns,¹⁸ counties, cities,¹⁹ or public officers.²⁰

§ 49. **Wharves and piers.**—A wharf or pier is to be treated as a public street; and, when it becomes out of repair, it is a public nuisance.²¹ The liabilities are not the same as in the case of highways. The wharf being for the use of both teams and freight, each must be used with a reasonable regard for the safety and convenience of the other.²² An owner or lessee of a pier or wharf, such as a steamboat company, must exercise reasonable care in protecting persons who come to meet its passengers on its wharves, whether owned or rented by it.²³

§ 50. **Riding and driving.**—The rider or driver of a horse or other animal must use ordinary care in its management, and is liable for all damages occasioned by his carelessness.²⁴ It is a general rule that persons meeting in a street or highway must, for the purpose of passage, turn towards the right.²⁵ A person on the wrong side of the road, at the time of the passage of and collision with an opposite vehicle, raises a presumption of negligence on the part of the former.²⁶ But the presence on, or use of, the wrong side of the road may be jus-

¹⁸ *Hill v. Board of Suprs. of Livingston Co.*, 12 N. Y. 52 (1854). 81 Me. 362 (1889); *Shearm. & Redf. on Neg.* (5th ed.), § 725.

¹⁹ *City of Goshen v. Myers*, 119 Ind. 196 (1889). ²⁴ *Shearm. & Redf. on Neg.* (5th ed.), § 644; *Leame v. Bray*, 3 East,

²⁰ *Gen. Stats of New Jersey* (vol. 1), p. 307, § 9; *Ripley v. Chosen Freeholders*, 11 Vr. 45 (1878); *Jevnee v. Chosen Freeholders*, 23 id. 553 (1890). 593 (1803); *Waldron v. Hopper*, 339 (N. J. 1795); *Rappelyea v. Hulse*, 7 Halst. 257 (1831); *Strohl v. Levan*, 39 Pa. St. 177 (1861); *Clafin v. Wilcox*, 18 Vt. 605 (1846); *Daniels v. Clegg*, 28 Mich. 32 (1873). For a collection of cases illustrating examples of negligence in riding and driving, see *Shearm. & Redf. on Neg.* (5th ed.), § 645.

²¹ See *Ahern v. Steele*, 48 Hun, 517 (1888); 1 N. Y. Supp. 259; 115 N. Y. 203 (1889).

²² *Hall v. Tillson*, 81 Me. 362 (1889).

²³ *York v. Canada Atl. S. S. Co.*, 22 Can. S. C. 167 (1893); *Onderdonk v. Smith*, 27 Fed. Rep. 874 (1886); *Thomas v. Henges*, 131 N. Y. 453 (1892); *McCaldin v. Parke*, 142 id. 564 (1894); *Hall v. Tillson*, 155 Mass. 331 (1892).

²⁵ *Elliott on Roads and Streets*, 619; *Shearm. & Redf. on Neg.* (5th ed.), §§ 649–652; *Thomas on Neg.* 1178.

²⁶ *Ib.*; *Randolph v. O'Riordon*, 155 Mass. 331 (1892).

tified by circumstances.²⁷ The rights of travellers on a public highway are mutual and co-ordinate — it is the duty of each to so use his right of passage as not to cause injury or detriment to another having a like right. The one is responsible for an injury caused to the other, when he could have avoided it, without leaving the beaten track.²⁸ In crossing streets, a foot traveller has an equal right with vehicles, but no more. Their duty to use care to avoid injury is reciprocal.²⁹ The driver of a horse using the public highway for the purpose of travel, which runs away and becomes unmanageable thereby doing damage, is only liable for negligence.³⁰ It is not *per se* negligence to leave a gentle and kind, though a high-spirited horse unhitched in a public street.³¹ It is usually a question for the jury.³² For cases illustrating liability for frightening horses by obstructions, noises, etc., such as whistles.³³

§ 51. **Bicycles.** — Cycles of every kind are “carriages” or “vehicles,” and subject to the law of vehicles, so far as reasonably applicable.³⁴ They are subject to the general “rule of

²⁷ *Ib.*; *Strouse v. Whittlesey*, 41 Conn. 559 (1874); *Wrinne v. Jones*, 111 Mass. 360 (1873).

²⁸ *Pigott v. Engle*, 60 Mich. 221 (1886).

²⁹ *Barker v. Savage*, 45 N. Y. 191 (1871).

³⁰ *Unger v. Forty-second Street &c. R. R. Co.*, 51 N. Y. 497 (1873); *Thomas on Neg.* 1180.

³¹ *Park v. O'Brien*, 23 Conn. 339 (1854). *Contra*, *Higgins v. Wilmington City Ry. Co.*, 1 Marvel, 352 (Del. 1895).

³² *Wasmer v. Delaware &c. R. R. Co.*, 80 N. Y. 212 (1880); *Southworth v. Old Colony Ry. Co.*, 105 Mass. 342 (1870); *Elliott on Roads & Streets*, 628; *Thomas on Neg.* 1181. New York, see 1 Rev. Stats. 695, tit. 13, chap. 20, part 1; 2 Rev. Stat. (Banks' 6th ed.), p. 983.

³³ See *Thomas on Neg.* 1181; *McCann v. Consolidated Tract Co.*, 30 Vr. 481 (1896).

For a statement and discussion of the law and authorities of the rights of vehicles on the streets and highways going in the same-direction, see *Elliott on Roads & Streets*, 621; *Thomas on Neg.* 1180; *Shearm. & Redf. on Neg.* (5th ed.), chap. 31, § 644 *et seq.* Bicycles. 4 Am. & Eng. Ency. of Law (2d ed.), p. 27.

³⁴ *Shearm. & Redf. on Neg.* (5th ed.), § 653. Bicycles are vehicles. *Thompson v. Dodge*, 58 Minn. 555 (1894); *Myers v. Hinds*, 110 Mich. 300 (1896); *State v. Collins*, 16 R. I. 371 (1888); 4 Am. & Eng. Ency. of Law (2d ed.), p. 16; *Taylor v. Goodwin*, L. R., 4 Q. B. D. 228 (1879).

the road," as to keeping to the right or left.³⁵ They have equal rights of the road with other vehicles.³⁶ A bicycle is a vehicle, and riding one in the usual manner as is now done upon the public highways, for convenience, recreation, pleasure or business, is not unlawful.³⁷ A highway is intended for public use, and a person driving a horse thereon has no rights superior to those of a person riding a bicycle.³⁸

³⁵ State v. Collins, 16 R. I. 371 (1888); 4 Am. & Eng. Ency. of Law (2d ed.), p. 25.

³⁶ Holland v. Bartch, 120 Ind. 46 (1889).

³⁷ Thompson v. Dodge, 58 Minn. 555 (1894).

³⁸ Thompson v. Dodge, 58 Minn. 555 (1894).

Mr. Justice Depue, of the Supreme Court of New Jersey, in a charge to the grand jury of Essex county, at the September term, 1898, stated the law applicable to the duties and liabilities of bicyclists riding on the public highways with clearness and conciseness thus: "In the first place, the use of the public streets by this new method of propulsion is lawful; but such use, though lawful, is subordinate to a duty on the part of those using the streets for that purpose to exercise care that others, and especially pedestrians, having an equal right in the streets, may not receive injuries. In defining the degree of care to be observed in such cases, the cardinal doctrine of the law is that where there is a common right to a common use the care required depends upon the circumstances of the particular user. Persons having occasion to cross streets in which electric cars run are made aware, by the location of the tracks, of the direction from which danger may come. Pedestrians

are also made aware of the approach of wagons by the noise, and these vehicles are of a size to be capable of being easily observed as they approach, by simply looking. With respect to bicycles, their approach is noiseless; their size is such as not to be easily seen, especially in a street where there are wagons and other vehicles; and the direction from which they approach is not in any manner fixed. The only efficient means of indicating their approach is by the small bell. It is supposed by some that the bicyclist performs his entire duty at street crossings if he sounds his signal, and that pedestrians are under an obligation to hear and make way for his passage. No more erroneous idea could be entertained. The bell may not be heard by the pedestrian, and, if heard, does not indicate what shall be done to escape the danger. Shall he stop, stand still? Shall he run? If so, in what direction? A signal so uncertain in every aspect does not fulfill the requirements of the law, nor has any statute conferred upon signals of this character that immunity which is conferred upon signals required to be given by a railroad company in the transit of its trains over public highways. To lay down any fixed rule in this class of cases for the guidance of juries, beyond the statement of the

§ 52. **Liability of street railway companies to vehicles and pedestrians.**—The rights and duties of street railway companies using the public streets and highways and other vehicles, and pedestrians are correlative, each owing a duty to the other to avoid accidents.³⁹ One in charge of a street car has the right to presume that one walking along side of a track will exercise the caution which a person of ordinary prudence would exercise.⁴⁰ The rights of street railroad companies and other vehicles in the streets are equal.⁴¹ The public have a right to use street railway tracks in common with the railway companies.⁴² “Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other.”⁴³ A street railway

general principle, would be impracticable. Every case must rest upon its own circumstances and upon the inquiry whether the rider of the vehicle so managed it, as to speed and otherwise, that the pedestrian was made aware of its approach in season and under such circumstances as would have enabled him to avoid the injury in the exercise of reasonable care. The running down of a pedestrian at a street crossing by a bicyclist riding at an unreasonable rate of speed, or without observing such precautions with respect to his approach as would put the pedestrian in the wrong, will involve the former in responsibility for his wrongful act.”

Bicycle cases, see *Schimpf v. Sliter*, 64 Hun, 463 (1892); 19 N. Y. Supp. 644. Collision of electric car with bicycle, contributory negligence. *Everett v. Los Angeles & C. Ry. Co.*, 115 Cal. 105 (1896). Riding a bicycle on sidewalk. *Commonwealth v. Forrest*, 170 Pa. St. 40 (1895); *Lechner v. Village of Newark*, 44 N. Y. Supp. 556 (1896).

A person riding a bicycle against one standing upon a sidewalk is liable for assault and battery. *Mercer v. Corbin*, 117 Ind. 450 (1888); *Myers v. Hinds*, 110 Mich. 300 (1896). Case of collision with a bicycle. *Cook v. Fogarty*, 103 Iowa, 500 (1897).

³⁹ *Thomas on Neg.* 1174; *Elliott on Roads & Streets*, chap. 29, “Street Railways.” See 10 Am. & Eng. Ency. of Law (2d ed.), p. 887, title “Electric Railroads.”

⁴⁰ *Beem v. Tama & C. Light Co.*, 104 Iowa, 563 (1898).

⁴¹ *Cooke v. Baltimore Tract. Co.*, 80 Md. 551, 554 (1895); *Lake Roland Elev. Ry. Co. v. McKewen*, 80 id. 593 (1895); *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395 (1892); *Watson v. Minneapolis Street Ry. Co.*, 53 id. 551 (1893); *O’Neal v. Dry Dock & C. R. R. Co.*, 129 N. Y. 125 (1891); *San Antonio Street Ry. Co. v. Mechler*, 87 Tex. 628 (1895).

⁴² *Gilmore v. Federal Street & C. Ry. Co.*, 153 Pa. St. 31 (1893).

⁴³ *Omaha Street Ry. Co. v. Cameron*, 43 Neb. 297 (1895); *Atlantic Coast Electric R. R. Co. v.*

company must exercise, in the running of its cars, such care and precaution for the purpose of avoiding accidents and endangering property or persons, as reasonable prudence would suggest. The company has only an equal right with the public, with a few exceptions, such as, that the car runs on a track, and a passing vehicle must give way to it.⁴⁴ The measure of the duty of one in crossing a public highway, traversed by surface cars, propelled by electricity, is to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances.⁴⁵ He must use a degree of care and caution commensurate with the circumstances of the case.⁴⁶ "In exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, he is required to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances."⁴⁷ The rights of a street railway to its tracks

Rennard, Vr. ; 6 Am. Neg. Rep. 125 (1899). So under an ordinance which entitles the street car to the track, see *Thoresen v. La Crosse Ry. Co.*, 87 Wis. 597 (1894); *Laethem v. Fort Wayne &c. R. R. Co.*, 100 Mich. 297 (1894). The highest degree of caution is required of those in charge of street railway cars at points where street railway lines intersect. An electric car has no exclusive or superior right of way over a horse car at a point where the two car lines intersect. It is the duty of the motorman or the driver of the car last arriving at the intersection to stop and let the other pass. The driver of the horse car, under such conditions, is justified in supposing that an approaching electric car is moving within the maximum rate of speed prescribed by law, and that the motorman will respect his rights as that of the first arrival at the crossing, if he be such, either by slackening its speed, or by coming to a full stop. Metropolitan R. R. Co. v. Hammett, 13 App. Cas. (D. C.) 370 (1898).
⁴⁴ *Shea v. Potrero &c. R. R. Co.*, 44 Cal. 414 (1872); *Consolidated Traction Co. v. Glynn*, 30 Vr. 432 (1896); *Consolidated Traction Co. v. Lambertson*, id. 297 (1896); *San Antonio Street Ry. Co. v. Mechler*, 87 Tex. 628 (1895). It has the right to use the highway in common with the general public, but it has no exclusive control over or of it, and no right or title in it which precludes the public authorities from making such use of it as the public exigencies require. *Lynn &c. R. R. Co. v. Boston &c. R. R. Co.*, 114 Mass. 88 (1873).
⁴⁵ *Consolidated Traction Co. v. Chenowith*, 29 Vr. 416 (1896); *Clark v. Bennett*, 123 Cal. 275 (1899).
⁴⁶ *Robbins v. Springfield Street Ry. Co.*, 165 Mass. 30 (1895). See *Heucke v. Milwaukee City Ry. Co.*, 69 Wis. 401 (1887).
⁴⁷ *Magie, J., in Newark Pass. Ry. Co. v. Block*, 26 Vr. 605, 612 (1893). He must use his powers of observa-

are superior to the rights of foot passengers;⁴⁸ except at street crossings, where they are equal.⁴⁹ Street cars propelled by electricity cannot run at a rate of speed incompatible with the lawful and customary use of the highway by others.⁵⁰ Speed in excess of the allowable rate of speed is evidence of negligence.⁵¹ To run an electric car along a narrow and unlighted alley, on a dark night, so fast that it cannot be stopped within the distance covered by its own headlight, is negligence.⁵² A motorman in charge of an electric car moving in the public streets, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of the car.⁵³

tion and his judgment how and when to cross without collision. *Ib.* Before crossing the tracks of an electric street railway the plaintiff must look and listen. *Young v. Citizens Street R. R. Co.*, 148 Ind. 54, 58 (1896). It is not under all circumstances negligence *per se* not to look and listen before crossing a trolley track. *Consolidated Traction Co. v. Haight*, 30 Vr. 577 (1896). The principle of look and listen of general application in cases of steam railroad crossings, can hardly be applied in its strict sense to the crossing of a street railroad. *Capitol Traction Co. v. Lusby*, 12 App. Cas. (D. C.) 295 (1898). Persons travelling upon a public street, and crossing street-car tracks, are not held to the same degree of care as when crossing a steam railroad track. *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281, 289 (1898); *Robbins v. Springfield Street Ry. Co.*, 165 Mass. 30 (1895); *Clark v. Bennett*, 123 Cal. 275 (1899). *Contra*, the rule that one before attempting to cross the tracks should "stop, look and listen" applies to a street railway moved by electricity. *Hoelzel v. Crescent City R. R. Co.*, 49 La. Ann. 1302 (1897).
⁴⁸ They have a preference in the streets; they must be managed with care. *Fenton v. Second Ave. R. R. Co.*, 126 N. Y. 625 (1891); *Hot Springs Street Ry. Co. v. Johnson*, 64 Ark. 420 (1897).
⁴⁹ *Schulman v. Houston & c. R. R. Co.*, 36 N. Y. Supp. 439 (1895); 15 N. Y. Misc. 30.
⁵⁰ *Newark Pass. Ry. Co. v. Block*, 26 Vr. 605 (1893).
⁵¹ Is conclusive when no explanation is given. *Riley v. Salt Lake & c. Co.*, 10 Utah, 428 (1894); *Cooke v. Baltimore Traction Co.*, 80 Md. 551 (1895).
⁵² *Gilmore v. Federal Street & c. Ry. Co.*, 153 Pa. St. 31 (1893). So to overload the servants of an electric car with work & c.; the duty which a car company and its employees owe to the public is paramount to that which they owe each other. *Anderson v. Minneapolis Street Ry. Co.*, 42 Minn. 490 (1890).
⁵³ *Bergen County Traction Co. v. Heitman*, 32 Vr. 682 (1898); *San Antonio Street Ry. Co. v. Mechler*, 87 Tex. 628 (1895).

§ 53. **The rule stated — New York.**—The Court of Appeals of New York has expressed the law thus: “As the cars must run upon the tracks and cannot turn out for vehicles drawn by horses, they must have the preference and such vehicles must, as they can, in a reasonable manner, keep off from the railroad track so as to permit the free and unobstructed passage of cars. In no other way can street railways be operated. As to such vehicles, the railways have the paramount right, to be exercised in a reasonable and prudent manner. But a railway crossing at a street, stands upon a different footing. The car has the right to cross and must cross the street, and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other.”⁵⁴ “It is undoubtedly well settled that street railway cars have, to a certain degree, the right of way over their tracks in respect to vehicles passing in the same or opposite directions to the cars within the space embraced between their tracks. This right has been conceded to vehicles of the description of street cars, simply because of the necessities of the situation. A street car is confined to its track; it cannot turn out to pass a vehicle which is proceeding in the same direction with it at a slower pace, neither can it turn out to avoid a vehicle passing in an opposite direction. And it is because of this inability and the fact that their calling could not be performed without giving them this right, that it has been held that they have the right of way within the limitations already mentioned. But in respect to these points, where their car tracks cross other streets, there is no reason and no necessity for giving to vehicles of this description any such exclusive right. Their use of the streets at such points is of precisely the same nature and character as that of other vehicles, and their rights to the street and the use thereof in respect to other vehicles are precisely the same as those of such other vehicles.”⁵⁵

⁵⁴ Earl, J., in *O’Neil v. Dry Dock Ry. Co.*, 30 Vr. 302 (1896). See &c. *R. R. Co.*, 129 N. Y. 125, 130 *Flournoy v. Shreveport &c. Ry.* (1891); *Zimmerman v. Union Ry. Co.*, 50 La. Ann. 635 (1898); 23 Am. Co., 38 N. Y. Supp. 362 (1896); 3 & Eng. Ency. of Law, p. 1028. N. Y. App. Div. 219. To the same effect is *Buttelli v. Jersey City &c. Dry Dock &c. R. R. Co.*, 53 Hun,

§ 54. **The rule stated — Pennsylvania.**— The relative duties of street car companies, and citizens at street crossings or other places, are defined by the Supreme Court of Pennsylvania as follows: “ There is this distinction to be observed between steam railroads and street railways. In the case of the former, they have the exclusive right to the use of their tracks at all times and for all purposes, except at road crossings. Street railways have not this exclusive right. Their tracks are used in common by their cars and the travelling public. While this common use is conceded, and is unavoidable in towns and cities, the railway companies and the public have not equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: first, the fact that the car cannot turn out, or leave its track; and, secondly, for the convenience and accommodation of the public. These companies have been chartered for the reason, in part at least, that they are a public accommodation. The convenience of an individual, who seeks to cross one of their tracks, must give way to the convenience of the public. It would be unreasonable that a carload of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle. On the other hand, it is the duty of the companies to see that their motormen shall be on the alert, not only at street crossings, but everywhere upon the tracks, to see that citizens are not run down and injured. The rule to stop, look and listen is applicable, in part at least, to crossing street railways. A person driving a vehicle has but to use his eyes to avoid such accidents. There is no danger, as in the case of steam roads, of stopping a horse at the very edge of the track. When, therefore, a citizen attempts to cross such track, it is his duty when he reaches it to look in both directions for an approaching car. It very rarely, if it ever, happens that the street is so obstructed that the car may not be seen as the citizen approaches the track. It is his duty to look at that point, and if there is any obstruction, to listen, and his neglect to do so is negligence *per se*. This is an unbending rule to be observed at all times and under all circumstances.”⁵⁶ “ There is

571, 573 (1889); affirmed, 125 N. Y. 56 Paxson, C. J., in *Ehrisman v. 702* (1890). See *Fleckenstein v. East Harrisburg City Pass. Ry. Co., Dry Dock &c. R. R. Co.*, 105 N. Y. 150 Pa. St. 180, 186 (1892). See *Gilmartin v. Lackawanna &c. Transit* 655 (1887).

no just analogy between the right of a street railway company running cars longitudinally along the highway and the right of a railroad company running its trains across a highway at grade. The latter company acquires by condemnation a right to run its tracks over the lands covered by the highway, and so burdens it with an additional easement."⁵⁷

§ 55. **Railroad crossings.**—The rights of railroad companies and of travellers at highway crossings are said to be "mutual, coextensive and, in all respects, reciprocal."⁵⁸ This is true only in a limited sense, for the statement should be taken with the qualification that the railroad company has the right of way, and the traveller must wait until the train, the coming of which he knows, or ought to know, has passed.⁵⁹ In respect to the priority of passage, the right of the company is superior.⁶⁰ Their rights are co-ordinate and equal.⁶¹ At the place of intersection there are concurrent rights.⁶² They have mutual and reciprocal duties.⁶³ The rights and duties of the railroad company and persons at railroad crossings are mutual, it being the duty of each to exercise that degree of care that a man of ordi-

Co., 186 id. 193 (1898); *Smith v. cago &c. R. R. Co. v. Lee*, 87 Ill. Electric Traction Co., 187 id. 110 454 (1877); *Black v. Burlington &c. Ry. Co.*, 38 Iowa, 515 (1874); *New* (1898).

⁵⁷ *Magie, J., in Newark Pass. Ry. v. Block*, 26 Vr. 605, 611 (1893).

⁵⁸ 1 *Rorer on Railroads*, 531; *Hendrickson v. Great Northern Ry. Galena &c. R. R. Co. v. Dill*, 22 Ill. Co., 49 Minn. 245, 251 (1892).

264 (1859); *Atchison &c. R. R. Co. v. McClurg*, 59 Fed. Rep. 860 113 Ind. 196 (1887); *Lake Shore &c. (1894); Gulf &c. Ry. Co. v. Smith*, R. R. Co. v. Miller, 25 Mich. 274 87 Tex. 348 (1894); *Louisville &c. (1872).*

R. R. Co. v. Goetz, 79 Ky. 442 61 *Pittsburgh &c. Ry. Co. v. (1882); Hendrickson v. Great Maurer*, 21 Ohio St. 421 (1871); *Northern Ry. Co.*, 49 Minn. 245, 251 Ohio &c. Ry. Co. v. Walker, 113 Ind. 196, 202 (1887); *Black v. Burlington &c. Ry. Co.*, 38 Iowa, 515 (1892); 8 Am. & Eng. Ency. of Law Ind. 196, 202 (1887); *Black v. Burlington &c. Ry. Co.*, 38 Iowa, 515 §§ 2322, 3830; *Conner v. Barfield*, (1874).

102 Ga. 485 (1897); *Parish v. West- 62 North Pennsylvania R. R. Co. ern &c. R. R. Co.*, id. 285 (1897). v. Heileman, 49 Pa. St. 60, 64 (1865). Neither has an exclusive

⁵⁹ *Pierce on Railroads*, 342; *El- right of passage. Ib.*
lott on Roads & Streets, 605; Ohio

&c. Ry. Co. v. Walker, 113 Ind. 196, 202 (1887); *Continental &c. Co. 63 Continental &c. Co. v. Stead*, 95 U. S. 161 (1877).

v. Stead, 95 U. S. 161 (1877); Chi-

nary prudence would use under the same circumstances.⁶⁴ A railroad company is bound to use ordinary care to prevent injuries to persons⁶⁵ other than its passengers. One railroad company is bound to use ordinary care in crossing the tracks of another railroad company.⁶⁶ When a street railroad's tracks crossed those of a steam railroad, it was held by the New York Court of Appeals that the street railroad company, for the protection of its passengers, under the circumstances, was bound to use the highest degree of care and prudence, the utmost skill and foresight, and such is the settled law.⁶⁷

§ 56. **Duty of traveller to look and listen.**—The degree of care required of a person approaching a dangerous place should be proportioned to the degree of danger, known or apparent.⁶⁸ In crossing the tracks of a railroad operated by steam, more care is required than in crossing a railroad operated by horses, because the cars upon the former move more rapidly and cannot be so readily stopped as those upon the latter.⁶⁹ It is the settled law that, before the traveller attempts to cross, he must look in both directions and listen for the approach of a train.⁷⁰

⁶⁴ *Gulf &c. Ry. Co. v. Smith*, 87 Tex. 348 (1894). Reasonable care and prudence must be exercised by each, in the use of the crossing, so as not to interfere unnecessarily with the other. *Pittsburgh &c. Ry. Co. v. Maurer*, 21 Ohio St. 421 (1871); *Studer v. Southern Pacific Co.*, 121 Cal. 400 (1898); *Chicago &c. R. R. Co. v. Pollard*, 53 Neb. 730 (1898).

⁶⁵ *Flynn v. Central R. R. Co. of N. J.*, 142 N. Y. 439 (1894); *Western &c. R. R. Co. v. King*, 70 Ga. 261 (1883); *Gulf &c. Ry. Co. v. Smith*, 87 Tex. 348 (1894); *Conley v. Cincinnati &c. Ry. Co.*, 89 Ky. 402 (1889); *Shearm. & Redf. on Neg.* (5th ed.), § 457.

⁶⁶ *Chicago &c. Ry. Co. v. Chambers*, 15 C. C. A. 327; 68 Fed. Rep. 148 (1895).

⁶⁷ *Coddington v. Brooklyn Cross-town R. R. Co.*, 102 N. Y. 66, 69 (1886). In some States by statute

engineers are required to stop before crossing. *Alabama Code* (1886), § 1145; *Richmond &c. R. R. Co. v. Freeman*, 97 Ala. 289 (1886); *Burns' Iowa Rev. Stat.* (1894), § 2172; *Rev. Stat.* 1881; *Cleveland &c. Ry. Co. v. Gray*, 148 Ind. 266 (1897).

⁶⁸ *Weber v. New York &c. R. R. Co.*, 58 N. Y. 451, 456 (1874); *Judson v. Central Vt. R. R. Co.*, 158 id. 597 (1899), reversing 91 Hun, 1.

⁶⁹ *Feeney v. Long Island R. R. Co.*, 116 N. Y. 375, 379 (1889).

⁷⁰ *Weber v. New York &c. R. R. Co.*, 58 N. Y. 451 (1874). The rule requiring a traveller to look and listen before crossing a railroad track is not the criterion by which to determine the degree of care required of an employe about to cross a private railway operated as part of his employer's rolling-mill plant. *Weiss v. Bethlehem Iron Co.*, 88 Fed. Rep. 23 (1898).

It has been decided in many cases that one about to cross the tracks of a steam railroad at a highway crossing is bound to look and listen for the approach of the cars.⁷¹ The same character and degree of care to avoid a collision must be exercised by those operating an electric car along a public highway; in approaching and going over a steam railroad crossing of such highway, as is required to be exercised by one driving or operating any ordinary vehicle along and over such railroad crossing; they must look and listen for the approaching train.⁷² A primary rule of legal caution is that a person about to cross a railroad is bound to use his eyes and ears, to watch for signboards and signals, to listen for bell or whistle, and to guard against the approach of a train by looking each way before crossing.⁷³ He is bound to make vigilant use of his sight and hearing to discover and avoid danger, such use as a careful and prudent man would make under the same circumstances.⁷⁴ The duty of a person who is about to cross a railroad track is to be prudent — to look and listen, and to do the things that will make looking and listening reasonably effective. If the vision or hearing of such a person is limited by permanent obstructions or disturbances, he should for that reason be cautious; if his vision or hearing is limited by transient obstructions or disturbances, under circumstances which oblige him to rely on the sense thus limited, he should wait until it has again become efficient to warn him of peril. One sense, if well used, may give warning enough.⁷⁵ The rule which requires a person approaching a railroad crossing

⁷¹ Schofield v. Chicago &c. Ry. Co., 114 U. S. 615 (1885); Tolman v. Syracuse &c. R. R. Co., 98 N. Y.

198 (1885); Rodrian v. New York &c. R. R. Co., 125 id. 526 (1891);

Sprow v. Boston &c. R. R. Co., 163 Mass. 330 (1895); Pennsylvania R. Co. v. Righter, 13 Vr. 180 (1880);

Jennings v. St. Louis &c. Ry. Co., 112 Mo. 268 (1892); State v. Cumberland &c. R. R. Co., 87 Md. 183 (1898); 7 Am. & Eng. Ency. of Law (2d ed.), p. 427; Beach on Cont. Neg. (3d ed.), § 181; Shearm. & Redf. on Neg. (5th ed.), § 90; Patterson on Railroad Accident Law, p. 168; Bailey on Conflict of Judicial De-

cisions, 263.

⁷² New York &c. Ry. Co. v. New Jersey Electric Ry. Co., 31 Vr. 52 (1897).

⁷³ Pennsylvania R. R. Co. v. Righter, 13 Vr. 180, 185 (1880).

⁷⁴ Manley v. Delaware &c. Canal Co., 69 Vt. 101, 104 (1896); Severy v. Chicago &c. Ry. Co., 6 Okl. 153 (1897); Washington Southern Ry. Co. v. Lacey, 94 Va. 460 (1897); Lake Shore &c. R. R. Co. v. Miller, 25 Mich. 274 (1872).

⁷⁵ Adams, J., in Central R. R. Co. of N. J. v. Smalley, 32 Vr. 277, 279 (1897). See Merkle v. New York &c. R. R. Co., 20 id. 473 (1887); West Jersey R. R. Co. v. Ewan, 26 id. 574 (1893); Heaney v. Long

to look and listen is said not to be of universal application, but has exceptions under exceptional circumstances.⁷⁶ The traveller is excused from looking when looking would be unavailing on account of obstructions.⁷⁷ In Pennsylvania the traveller is bound to "stop, look and listen."⁷⁸ But the question whether the plaintiff stopped at a proper place, for the purpose of obtaining a view along the tracks, is for the jury.⁷⁹ Failure on the part of a traveller crossing a railroad track at grade to "stop, look and listen" is not merely evidence of negligence, but it is negligence *per se*, and a question of law for the court.⁸⁰ In Vermont, it is said a traveller approaching a railroad crossing is not bound, as a matter of law, to stop in order to avoid the imputation of negligence. If it is necessary for him to stop under the circumstances, then he must stop; but it is for the jury to say whether it was necessary or not;⁸¹ his omission to do so is a fact for the consideration of the jury.⁸²

Island R. R. Co., 112 N. Y. 122 (1889); Washington Southern Ry. Co. v. Lacey, 94 Va. 460 (1897).

⁷⁶ Jennings v. St. Louis &c. Ry. Co., 49 La. Ann. 1302 (1897).

Co., 112 Mo. 268 (1892); Wright v. Cincinnati &c. R. R. Co., 94 Ky. 114 (1893); Shaber v. St. Paul &c. Ry. Co., 28 Minn. 103 (1881); Chicago &c. Ry. Co. v. Hansen, 166 Ill. 623 (1897); Dolan v. Delaware &c. Canal Co., 71 N. Y. 285 (1877); Jewett v. Klein, 12 C. E. Gr. 550 (1876); Atlantic City R. R. Co. v. Goodin, 33 Vr. 394 (1898).

⁷⁹ Link v. Philadelphia &c. R. R. Co., 165 Pa. St. 75 (1895).

⁸⁰ Ritzman v. Philadelphia &c. R. R. Co., 187 Pa. St. 337 (1898). This rule is unbending and should be rigidly enforced in Pennsylvania.

⁸¹ Manley v. Delaware &c. Co., 69 Vt. 101, 104 (1896); Judson v. Central Vt. R. R. Co., 158 N. Y. 597 (1899), reversing 91 Hun, 1.

When the view is obstructed. Atchison &c. R. R. Co. v. Powers, 58 Kan. 544 (1897). So in Illinois it was held that a failure to look and listen is not in itself, as a matter of law, such negligence as will prevent a recovery, but it is a fact to be considered by the jury in passing upon the question of ordinary care. Illinois Central R. R. Co. v. Batson, 81 Ill. App. 142 (1898).

⁸² Judson v. Central Vt. R. R. Co., 158 N. Y. 597 (1899).

⁷⁷ Southern Ry. Co. v. Bryant, 95 Va. 212 (1897).

⁷⁸ Pennsylvania R. R. Co. v. Beale, 73 Pa. St. 504 (1873); Ellis v. Lake Shore &c. R. R. Co., 138 id. 506 (1890); Link v. Philadelphia &c. R. R. Co., 165 id. 75 (1895); Ritzman v. Philadelphia &c. R. R. Co., 187 id. 337 (1898). In Louisiana the rule that one before attempting to cross the tracks should

§ 57. **Construction and maintenance of crossings.**—Railway companies must so construct and maintain their premises which abut upon highways and their tracks which run along or across highways that they shall not cause injury to travellers who are lawfully and properly using such highways, and if a company is negligent in this respect it will be liable to a traveller who, while exercising due care on his part, is injured by such negligence.⁸³ A railroad company is bound to use ordinary care in laying its tracks, roadbed and bridges, and to use ordinary care in keeping them safe, so that persons who have a right to pass over or under them, or to be upon them, will not be injured.⁸⁴ Thus, in a case where a plaintiff's foot was caught between the rails and planks, the question whether the crossing was defectively built was properly submitted to the jury.⁸⁵

§ 58. **Statutory signals.**—It is the duty of railroad companies to exercise vigilant care in operating trains at public crossings to prevent injury to individuals, which includes the duty of ringing the bell and blowing the whistle on the approach of a train, and of keeping a constant lookout.⁸⁶ But railroad companies are not bound to stop their trains nor slacken their speed on approaching public crossings, and a traveller who attempts to cross must be held to be aware of this rule and act with reference to it.⁸⁷ A railroad company is bound to give only

⁸³ Elliott on Roads & Streets, 601. at a public crossing. *Nixon v. Hannibal &c. R. R. Co.*, 141 Mo. 425 (1897).

⁸⁴ Shearm. & Redf. on Neg. (5th ed.), § 405; *Worster v. Forty-second Street R. R. Co.*, 50 N. Y. 203 (1872); *Wooley v. Grand Street &c. R. R. Co.*, 83 id. 121 (1880); *Payne v. Troy &c. R. R. Co.*, id. 572 (1881); *Nixon v. Hannibal &c. R. R. Co.*, 141 Mo. 425 (1897). The law does not impose on a railroad company the duty of insuring the safety of those crossing the tracks

⁸⁵ *Spooner v. Delaware &c. R. R. Co.*, 115 N. Y. 22, 28 (1889); *Payne v. Troy &c. R. R. Co.*, 83 id. 572 (1881).

⁸⁶ *Florida &c. R. R. Co. v. Williams*, 37 Fla. 406 (1896); *Frost v. Milwaukee &c. R. R. Co.*, 96 Mich. 470 (1893).

⁸⁷ *Ohio &c. R. R. Co. v. Walker*, 113 Ind. 196 (1887); *Dyson v. New York &c. R. R. Co.*, 57 Conn. 9 (1888); *New York &c. R. R. Co. v. Kistler*, 16 Ohio C. C. 316 (1894); *Lake Shore &c. R. R. Co. v. Miller*, 25 Mich. 274 (1872).

such signals at a crossing as the statute requires.⁸⁸ Failure to give statutory signals constitutes actionable negligence.⁸⁹

§ 59. **Landlord and tenant.**— It is a general principle of law, declared in many cases, that the owner of a building, under his control and in his occupation, is bound, as between himself and the public, to keep it in such proper and safe condition that travellers on the highway shall not suffer injury.⁹⁰ When the entire building, from foundation to roof, is rented to a tenant, the owner of the building is not, speaking generally, during the continuance of the term, liable for injuries happening, either to his tenants or to third persons,⁹¹ particularly so when, by the terms of the lease, the tenant covenanted to keep it in repair.⁹² He may become liable either to a tenant or to third

⁸⁸ *Grippen v. New York &c. R. J.*; *Murray v. McShane*, 52 Md. R. Co., 40 N. Y. 34 (1869); *Dyson v. New York &c. R. R. Co.*, 57 Conn. 9 (1889).

⁸⁹ *Chicago &c. R. R. Co. v. Boggs*, 101 Ind. 522 (1884). In New York the statute imposing upon railroad companies the duty to give signals when approaching a crossing has been repealed. § 7, chap. 282, Laws of 1854, repealed by chap. 593, Laws of 1886; *Petrie v. New York &c. R. R. Co.*, 66 Hun, 282 (1892). Notwithstanding the repeal of the statute commanding signals, yet it is the duty to approach crossings with care and caution and to give some warning by whistle, bell or otherwise, and the omission to do so may be received in evidence. *Friess v. New York &c. R. R. Co.*, 67 Hun, 205 (1893). Whether the omission to give signals is negligence in any particular case is now a question of fact for the jury in New York. *Sauerborn v. New York &c. R. R. Co.*, 69 Hun, 429 (1893).

⁹⁰ *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 153 (1873); *Durant v. Palmer*, 5 Dutch. 544 (1862, N.

⁹¹ *Thomas on Neg.* 694; *Shearm. & Redf. on Neg.* (5th ed.), § 708; *Kirby v. Boylston Market Assn.*, 14 Gray, 249 (1859); *Clancy v. Byrne*, 56 N. Y. 129 (1874); *Ahern v. Steele*, 115 id. 203 (1889); *Edwards v. New York &c. R. R. Co.*, 98 id. 245 (1885); *Doyle v. Union Pacific Ry. Co.*, 147 U. S. 413 (1892); *McKenzie v. Cheetham*, 83 Me. 543 (1891); *Trustees of Canandaigua v. Foster*, 156 N. Y. 354 (1898); 4 Am. Neg. Rep. 441; *O'Connor v. Andrews*, 81 Tex. 28 (1891).

⁹² *Pretty v. Bickmore*, L. R., 8 C. P. 401 (1873). In that case the aperture covered by an iron plate over a coal cellar under the footway was at the time of the demise out of repair and dangerous. A passer-by in consequence fell into the aperture and was injured. It was held, that the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for the accident. *Id.*; *Leonard v. Storer*, 115 Mass. 86 (1874). A leading case on the liability of an owner of demised premises for

persons through failure to exercise reasonable care to keep the premises in a state of reasonable repair and safety when, by the terms of the lease, he has agreed to make repairs.⁹³ Or the owner of the premises will be liable when the injury was caused by a nuisance which existed on the premises when the demise was made.⁹⁴ "The reason of the rule that if a landlord lets premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injuries suffered therefrom, is that by the letting he has authorized the continuance of the nuisance."⁹⁵ It is difficult, if not impossible, to formulate any general rule that will be of much value in its application to particular cases, in determining what facts do or do not constitute a nuisance for which the landlord is liable. As was said by Mr. Justice Scudder of the Supreme Court of New Jersey, in reference to another subject, each case must stand upon its peculiar facts, and natural rather than distinctively legal conclusions must usually be drawn from them. That which is a nuisance and that which is negligence cannot always be clearly marked.⁹⁶ An examination of the cases will show that the difficulty has arisen not so much with what the principle of law is, but in its application to particular cases.

§ 60. Landlord and tenant — Tenement or apartment houses.—

The landlord owes a duty to the tenants, and to those entering

a nuisance thereon is *Ahern v. (1891); Mancuso v. Kansas City, 74 Steele, 115 N. Y. 203 (1889), where Mo. App. 138 (1898). Such as a many authorities are collated. nuisance resulting from the structure of the building. Durant v. Palmer, 5 Dutch. 544 (1862, N. J.).*

⁹³ *Shearm. & Redf. on Neg. (5th ed.), § 709; Ahern v. Steele, 115 N. Y. 203 (1889). A grantee or devisee of premises, upon which there is a nuisance at the time the title passes, is not responsible therefor until he has had notice thereof. Ib.*

⁹⁴ *Swords v. Edgar, 59 N. Y. 28 (1874); Edwards v. New York & C. R. R. Co., 98 id. 245 (1885); Knauss v. Brua, 107 Pa. St. 85 (1884); City of Peoria v. Simpson, 110 Ill. 294 (1884); Nelson v. Liverpool Brewery Co., L. R., 2 C. P. D. 311 (1877); O'Connor v. Andrews, 81 Tex. 28*

The landlord will be liable for injuries caused by defects in the building overhanging a street such as the falling of a cornice and fire-wall. O'Connor v. Andrews, 81 Tex. 28 (1891). Or a grating in a sidewalk. Stevens v. Walpole, 76 Mo. App. 213 (1898).

⁹⁵ *Field, J., in Dalay v. Savage, 145 Mass. 38, 41 (1887); Tomle v. Hampton, 129 Ill. 379 (1889); City of Peoria v. Simpson, 110 id. 294 (1884).*

⁹⁶ See § 12.

the premises to visit them, to take reasonable care to keep the undemised parts of the premises in a reasonably safe state of repair. The rule only applies to parts used in common by the several tenants.⁹⁷ The owner is bound to use ordinary and reasonable care to keep in a reasonable state of safety any way, path or passage-way, appurtenant to said premises, which the tenants or third persons are entitled to use, being under the control of the lessor;⁹⁸ such as passage-ways which the tenants are entitled to use to reach the demised premises;⁹⁹ or any part of the premises reserved for the lessor's own use or controlled by him or in his possession,¹ or coal-holes in a walk,² or halls,³ or stairways.⁴ But there is no obligation on the part of the landlord to keep the halls lighted.⁵ He will be liable for injuries caused through defects of a dangerous character amounting to a nuisance, the existence of which the lessor knew, or of which, in the exercise of ordinary care, he should have known

⁹⁷ Shearm. & Redf. on Neg. (5th ed.), § 710; *Payne v. Irvin*, 144 Ill. 482 (1893); *Readman v. Conway*, 126 Mass. 374 (1879); *Looney v. McLean*, 129 id. 35 (1880); *Marwedel v. Cook*, 154 id. 235 (1891); *Dollard v. Roberts*, 130 N. Y. 269 (1891); *Palmer v. Dearing*, 93 id. 7 (1883); *Gillvon v. Reilly*, 21 Vr. 26 (1887); *O'Connor v. Andrews*, 81 Tex. 28 (1891); *Gleason v. Boehm*, 29 Vr. 475 (1896); *Miller v. Hancock*, L. R., 2 Q. B. D. 177 (1893). The same degree of care and diligence, to-wit, ordinary care and diligence, is required of both landlord and tenant in such cases. *Willecox v. Hines*, 100 Tenn. 538 (1897).

⁹⁸ *Lydecker v. Brintnall*, 158 Mass. 292 (1893); *Davenport v. Ruckman*, 37 N. Y. 568 (1868). See *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357 (1883); *Watkins v. Goodall*, 138 id. 533 (1884). Such as a hoisting apparatus erected by a landlord for the use of tenants. *O'Malley v. Twenty-five Associates*, 170 Mass. 471 (1898).

⁹⁹ *Totten v. Phipps*, 52 N. Y. 354 (1873); *Peil v. Reinhart*, 127 id. 381 (1891); *Dollard v. Roberts*, 130 id. 269 (1891).

¹ *Priest v. Nichols*, 116 Mass. 401 (1874). *Hatchways*. *Atkinson v. Abraham*, 45 Hun, 238 (1887). *Airshaft*. *Canavan v. Stuyvesant*, 7 Misc. 113 (1894, N. Y.).

² *Jennings v. Van Schaick*, 108 N. Y. 530 (1888); *Tomle v. Hampton*, 129 Ill. 379 (1889); *Mancuso v. Kansas City*, 74 Mo. App. 138 (1898). See *Lorenzo v. Wirth*, 170 Mass. 596 (1898).

³ *Dollard v. Roberts*, 130 N. Y. 269 (1891); *Henkel v. Murr*, 31 Hun, 28 (1883); *Idell v. Mitchell*, 158 N. Y. 134 (1899).

⁴ *Peil v. Reinhart*, 127 N. Y. 381 (1891); *Looney v. McLean*, 129 Mass. 33 (1880); *Miller v. Hancock*, L. R., 2 Q. B. D. 177 (1893).

⁵ *Hilsenbeck v. Guhring*, 131 N. Y. 674 (1892); *Gleason v. Boehm*, 29 Vr. 475 (1896).

when the demise was made,⁶ or when the premises are leased to be used as a nuisance,⁷ or for a business, or in a way so that they will necessarily become a nuisance.⁸

§ 61. **When tenant is liable.**—The tenant is liable for negligence in the use of the premises,⁹ or for a nuisance erected on the premises by him or existing by his sufferance, or retained by him, although existing thereon before the demise of the premises to him.¹⁰

§ 62. **When lessor and tenant are jointly liable.**—The lessor and the tenant may be jointly liable.¹¹ Where there has been

⁶ *Atkinson v. Abraham*, 45 Hun, 238 (1887); *Canavan v. Stuyvesant*, 7 Misc. 113 (1894, N. Y.); *Knauss v. Brua*, 107 Pa. St. 85 (1884); *Swords v. Edgar*, 59 N. Y. 28 (1874); *Edwards v. New York &c. R. R. Co.*, 98 id. 245 (1885); *Nugent v. Boston &c. R. R. Co.*, 80 Me. 62, 77 (1888); *Albert v. State*, 66 Md. 325 (1886); *Joyce v. Martin*, 15 R. I. 558 (1887).
⁷ *Ib.*

⁸ *Ahern v. Steele*, 115 N. Y. 203 (1889); *Owings v. Jones*, 9 Md. 108 (1856). A covenant in the lease, binding the lessee to keep a pier in good order and repair, does not remove or affect this liability to a third person, on the part of the lessor. *Swords v. Edgar*, 59 N. Y. 28 (1874).

⁹ *Shearm. & Redf. on Neg.* (5th ed.), §§ 712, 713; *Miller v. New York &c. R. R. Co.*, 125 N. Y. 118 (1890); *Eyre v. Jordan*, 111 Mo. 424 (1892); *Shidet v. Jules Dreyfuss Co.*, 50 La. Ann. 280 (1898).

¹⁰ *Timlin v. Standard Oil Co.*, 54 Hun, 44 (1889); *Harris v. Cohen*, 50 Mich. 324 (1883); *Durant v. Palmer*, 5 Dutch. 544 (1862); *Grogan v. Broadway Foundry Co.*, 87 Mo. 321 (1885); *Pickard v. Smith*, 10 C. B. (N. S.) 470 (1861);

Caldwell v. Slade, 156 Mass. 84 (1892); *Schindlebeck v. Moon*, 32 Ohio St. 264; *Abbott v. Jackson*, 84 Me. 449 (1892); *Mancuso v. Kansas City*, 74 Mo. 138 (1898). A lessor is not liable for a nuisance created or maintained on the premises by the tenant. *Grogan v. Broadway Foundry Co.*, 87 Mo. 321 (1885). Or where premises became dangerous merely by the manner of its use by a tenant in possession, the landlord is not liable for injuries resulting from such use. *Eyre v. Jordan*, 111 Mo. 424 (1892).

¹¹ *Swords v. Edgar*, 59 N. Y. 28 (1874); *Leonard v. Decker*, 22 Fed. Rep. 741 (1884); *Philadelphia &c. R. R. Co. v. Anderson*, 94 Pa. St. 351 (1880); *Peoria &c. R. R. Co. v. Lane*, 83 Ill. 448 (1876); *Joyce v. Martin*, 15 R. I. 558 (1887). If a landlord leases premises with a coal-hole in the sidewalk out of repair, and a tenant permits it to so remain, both landlord and tenant will be liable, to the party injured by such negligence. *Mancuso v. Kansas City*, 74 Mo. App. 138 (1898); *Durant v. Palmer*, 5 Dutch. 544 (1862, N. J.). An open area in front of a building, built for the purpose of a stairway to the base-

a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for damages resulting therefrom — the lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it; the lessor, if he at first created it, and then demised the premises with the nuisance upon them, and is receiving a benefit therefrom by way of rent or otherwise.¹²

§ 63. Master and servant — Liability of master for servants' acts.— "It is an old and thoroughly established doctrine that, where the relation of master and servant exists, the master is responsible to third persons for the damage caused by the wrongful acts or omissions of his servants in the course of their employment as such."¹³ There is no material difference whether the party committing the injury is a servant or agent. A servant is an agent.¹⁴ The relation of master and servant can be created only by contract, express or implied, and is purely a contractual relation.¹⁵ But the master's liability for the acts of his servant "is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master."¹⁶ The master is liable, although the negligent act of the servant may be done in disobedience of the master's orders.¹⁷

§ 64. The relation of master and servant must exist.—In order to establish the liability of the master, it is not enough

ment, belongs to the house, and both the owner and occupant are bound to render it safe to the public. *ib.*; *Houston v. Traphagen*, 18 Vr. 23 (1885).

¹² *Swords v. Edgar*, 59 N. Y. 28 (1874); *Eakin v. Brown*, 1 E. D. Smith, 36 (1850); *Irvin v. Fowler*, 4 Robt. 138; 5 *id.* 482 (1868). For liability of landlord or tenant, or both, for damages caused by water or other injurious substance coming from upper floor on lower floor of premises, see *Shearm. & Redf. on Neg.* (5th ed.), §§ 723, 724.

¹³ *Shearm. & Redf. on Neg.* (5th ed.), § 141; *Thomas on Neg.*, p. 735;

Coughtry v. Globe Woolen Co., 56 N. Y. 124 (1874); *Philadelphia & C. R. R. Co. v. Derby*, 14 How. 468 (U. S. 1852). This doctrine was derived from the Roman law. 2 Kent Com. (12th ed.) 260, n. 1.

¹⁴ *Wilson v. Owens*, 16 Ir. L. R. 225, 231 (1885).

¹⁵ *Stevens v. Armstrong*, 7 N. Y. 435, 442 (1852).

¹⁶ *Philadelphia & C. R. R. Co. v. Derby*, 14 How. 468, 485 (U. S. 1852).

¹⁷ *Philadelphia & C. R. R. Co. v. Derby*, 14 How. 468 (U. S. 1852); *Quinn v. Power*, 87 N. Y. 535 (1882).

to show that the person whose negligence caused the injury was at the time acting under an employment by the person or corporation sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them.¹⁸ The relation of master and servant or principal and agent must exist.¹⁹ The test of the liability of a principal or master for the torts of his agents or servants is whether the latter was at the time acting within the scope of his authority in the business of the principal or master, and not whether the act was done in accordance with his instructions.²⁰ If such act be done within the scope of authority, and while the agent or servant is engaged in his employer's business, the latter is bound for it.²¹

§ 65. Liability of master to servants—Negligence of fellow servants—Statutes.—In general, a master is not liable at common law to his servants for injuries to them, caused by the negligence of a fellow-servant²² in a common employment. But the defense of a common employment cannot prevail to exempt the defendant from liability unless the injured person and the servant whose negligence caused the injury, were not only engaged in a common employment, but were also in the service of the defendant as a common master.²³ The rule is well settled, both upon principle and authority, that the negli-

¹⁸ *King v. New York &c. R. R. Co.*, 4 Metc. 49 (Mass. 1842); *Murray v. South Carolina R. R. Co.*, 1 Hexamer v. Webb, 101 id. 377, 383 (1886).

¹⁹ *Hexamer v. Webb*, 101 N. Y. New York &c. R. R. Co., 70 Conn. 377 (1886); *Thorp v. Minor*, 109 N. 159, 194 (1898); *Gall v. Beckstein*, C. 152 (1891); *Stevens v. Armstrong*, 6 N. Y. 435 (1852); *Reed v. Allegheny City*, 79 Pa. St. 300 (1875); *Wilson v. Owens*, 16 Ir. L. R. 225 (1885).

²⁰ *Gregory v. Ohio River R. R. Co.*, 37 W. Va. 606 (1893); *Tierney v. Syracuse &c. R. R. Co.*, 85 Hun, 146 (1895); 32 N. Y. Supp. 627; *Chicago &c. R. R. Co. v. Casey*, 9 Ill. App. 632 (1881).

²¹ *Gregory v. Ohio River R. R. Co.*, 37 W. Va. 606 (1893).

²² *Farwell v. Boston &c. R. R.*

²³ *Jansen v. Mayor &c. of Jersey City*, 32 Vr. 243 (1897); *Johnson v. Lindsay, L. R.*, App. Cas. 371 (1891).

gence of a servant will not excuse the master from liability to a coservant for an injury which would not have happened had the master performed his duty.²⁴ Or the rule expressed in other words is, that where a servant receives an injury occasioned in part by the negligence of his master, and in part by that of a fellow servant, he can maintain an action against his master for such injury.²⁵ For a lucid and concise state-

²⁴ *Coppins v. New York &c. R. R. Co.*, 122 N. Y. 557, 562 (1890); *Booth v. Boston &c. R. R. Co.*, 73 id. 38 (1878); *Chicago &c. Ry. Co. v. Chambers*, 68 Fed. Rep. 153 (1895); *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700 (1882).

²⁵ *Paulmier v. Erie R. R. Co.*, 5 Vr. 151 (1870); *Hulehan v. Green Bay &c. R. R. Co.*, 68 Wis. 520 (1887). The doctrine of the common law which exempts a master from liability to a servant caused by the negligence of a fellow servant has been modified and greatly changed in many of the States by statute.

England: English Employers' Liability Act of 1880, 43 & 44 Vict., chap. 42.

Alabama: Code 1886, §§ 2590-2592.

Arkansas: Stats., §§ 6248-6250; act of February 28, 1893. Confined to persons engaged in the service of railway corporations.

California: Code, § 1970.

Colorado: Laws of 1893, chap. 77, § 1.

Florida: Laws of 1891, chap. 4071. Confined to persons injured by a railroad company by the running of the locomotives, cars, or other machinery of such company.

Georgia: Code, §§ 2202, 3036, act of 1855. Confined to injured employes of railroad companies.

Indiana: Stats. 1896, § 5206s. Applies to every railroad or other

corporation, except municipal. See *Baltimore &c. Ry. Co. v. Little*, 149 Ind. 167 (1897).

Iowa: Code, § 1307. Applies to every corporation operating a railway.

Kansas: Laws of 1874, chap. 93, § 1; 1 Gen. Stat. 1889, par. 1251. Applies to every railroad company organized or doing business in the State.

Massachusetts: Act 1894, chap. 499, § 1.

Minnesota: Chap. 13, Laws 1887. Mississippi: Constitution 1890, § 193; Ann. Code, § 3559. Applies to employes of railroad corporations; the legislature may extend the remedies therein provided for to any other class of employes.

Montana: Constitution 1889, art. 15, § 16; Civil Code, § 2242.

New Mexico: Laws of 1893, chap. 28. Applies to corporations operating railways.

North Carolina: Laws of 1897, chap. 56; *Wright v. Southern Ry. Co.*, 123 N. C. 280 (1898).

Ohio: Laws of 1890, p. 149, § 3. Applies to those in the employ of railroad companies.

South Carolina: Const. of 1895, see *Bussey v. Charleston &c. Ry. Co.*, 52 So. Car. 438 (1898).

Texas: Laws of 1891, chap. 24.

Utah: Laws of 1896, chap. 24.

Wisconsin: Laws of 1893, chap. 220. Applies to employes of railroad or railway companies.

ment of a master's liability to his servants for negligence, the reader is referred to Shearman and Redfield's book on Negligence, chapter X, 5th ed. The limitation of the master's liability to his servants for injury to them caused by the negligence of fellow servants, as enunciated by the multitude of decisions on this subject since 1841, and the history of the rule, with the various reasons on which it is said to be based, are there admirably stated.²⁶ For a list of cases in the various States as well as in the United States Supreme Court holding who are and who are not fellow servants within the rule exempting a master from liability to his servants for injuries caused to them by the negligence of a fellow servant.²⁷

§ 66. **Master does not insure servants against risks.**—The master does not insure the safety of his servants against risks, nor warrant them against injuries or death.²⁸ The test of liability is the negligence of the master, not the danger of the employment, although the danger of the employment may help to determine the ordinary care required in the case.²⁹ A servant assumes such risks as, from the nature of the business as ordinarily conducted, he must have known — those risks which the exercise of his opportunities for inspection would have disclosed to him;³⁰ but the servant does not assume risks of un-

²⁶ Thomas on Neg. 866; Master's Liability for Injuries to Servants, Bailey.

²⁷ See part 3, chap. "Defenses; Fellow Servants."

²⁸ Brymer v. Southern Pac. Co., 90 Cal. 496 (1891); Needham v. Louisville &c. R. R. Co., 85 Ky. 423 (1887); Colorado Cent. R. R. Co. v. Ogden, 3 Colo. 499 (1877); Washington &c. R. R. Co. v. McDade, 135 U. S. 554 (1889); Baltimore &c. R. R. Co. v. Mackey, 157 id. 72 (1895); Hough v. Texas &c. Ry. Co., 100 id. 213 (1879); Cunningham v. Bath Iron Works, 92 Me. 501 (1899).
²⁹ Knight v. Cooper, 36 W. Va. 232 (1892); Stewart v. Ohio River R. R. Co., 40 id. 188 (1895). An employe of age, and not shown to be below the average of mental capac-

ity and intelligence is presumed to observe and appreciate the dangers obviously incident to the operation of exposed, unguarded machinery. Jones v. Mfg. &c. Co., 92 Me. 565 (1899). The servant has the right to presume that the master will not send him into a dangerous place without assuming the risks of so doing. Doyle v. Missouri &c. Trust Co., 140 Mo. 1 (1897).

³⁰ Jerk on a gravel train. Central R. R. &c. Co. v. Sims, 80 Ga. 749 (1888); Crown v. Orr, 140 N. Y. 450 (1893); Kaare v. Troy Steel &c. Co., 139 id. 369 (1893); Libby v. Scherman, 146 Ill. 540 (1893); Ten- anty v. Boston Mfg. Co., 170 Mass. 323 (1898); Carrigan v. Washburn &c. Mfg. Co., id. 79 (1898).

known dangers.³¹ The general rule is that if the employe knows of the defects and continues in the service, he is deemed to have assumed the risks, and the maxim is applied of *volenti non fit injuria*.³² Where the danger is equally open to the observation of both the master and the servant, both are upon common ground, and the master is not liable, as a general rule, for resulting injuries.³³ A master is only liable to his servants for his own negligence.³⁴ The master is under no obligation to take better care of his servants than the servant may reasonably be expected to take of himself.³⁵ He is not liable if the servant chooses to adopt hazardous methods.³⁶ The risk consequent upon the failure of the master to properly discharge his duty to the servant is not a risk incident to his employment.³⁷ The servant on entering the employment of the master does not assume the risks of the master's negligence.³⁸ "The master is bound to use ordinary care, diligence and skill for the purpose of protecting his servants from encountering unnecessary risks in his service; but he is not bound to use any higher degree of care."³⁹ Reasonable care, and not the highest

The servant does not assume extraordinary risks. *Chicago &c. Ry. Co. v. Gillison*, 173 Ill. 264 (1898). For a collection of many cases on the risks assumed by servants see *Shearm. & Redf. on Neg.* (5th ed.), § 185.

³¹ *Whitney &c. Co. v. O'Rourke*, 172 Ill. 177 (1898).

³² *Colorado Central R. R. Co. v. Ogden*, 3 Col. 499 (1877); *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268 (1898); *Gann v. Railroad Co.*, 101 Tenn. 380 (1898). He must not only know the defects, but he must also know the dangers and risks attending the operation of the machinery by reason of the defects. *Nofsenger v. Goldman*, 122 Cal. 609 (1898); *Iron Co. v. Pace*, 101 Tenn. 476 (1898).

³³ *Evansville &c. R. R. Co. v. Henderson*, 134 Ind. 639 (1893).

³⁴ *Hough v. Texas &c. Ry. Co.*, 100 U. S. 213 (1879); *Booth v. Bos-*

ton &c. R. R. Co., 73 N. Y. 38, 40 (1878). Negligence cannot be imputed to the master for failure to foresee and guard against a danger which is wholly improbable. *Standard Oil Co. v. Helmick*, 148 Ind. 457 (1897).

³⁵ *Karr Supply Co. v. Kroenig*, 167 Ill. 560 (1897).

³⁶ *Homersky v. Winkle Terra Cotta Co.*, 178 Ill. 562 (1899).

³⁷ *Promer v. Milwaukee &c. Ry. Co.*, 90 Wis. 215 (1895); *Rhoades v. Varney*, 91 Me. 222 (1898); *McGregor v. Reid &c. Co.*, 178 Ill. 464 (1899).

³⁸ *Booth v. Boston &c. R. R. Co.*, 73 N. Y. 40 (1878); *Rex v. Pullman Palace Car Co.* (Del.), 43 Atl. Rep. 246 (1897).

³⁹ *Shearm. & Redf. on Neg.* (5th ed.), § 189, and cases cited; *Baltimore &c. R. R. Co. v. Rowan*, 104 Ind. 88 (1885); *Hough v. Texas &c. Ry. Co.*, 100 U. S. 213 (1879); *Whip-*

efficiency which skill and foresight can produce, is the measure of a master's liability to his servant.⁴⁰

§ 67. **Safe place to work — Tools—Machinery—Appliances.—**

It is a general rule of law that the master is bound to use ordinary care and diligence, to provide a reasonably safe place for his servants to do their work.⁴¹ The reason for the rule is that the master is ordinarily in the possession or control of the premises where the work is done.⁴² But this is limited to the premises where the employe is required to be for the purpose of his employment.⁴³ To provide reasonably safe, sound and suitable tools, implements, machinery and materials with which to work.⁴⁴ The purchase of machinery and appliances of approved quality and kind, of a reputable dealer and manufacturer, and reasonable care in inspection for the purpose of discovering obvious defects are sufficient.⁴⁵ The master is not bound to provide the newest or best possible appliances, but such as are reasonably safe and suitable, and such as are ordinarily used and which are in good repair.⁴⁶ The duty of the master to furnish the servant with reasonably safe tools, machin-

ple v. New York &c. R. R. Co., 19 R. I. 587 (1896); Last Chance Mining &c. Co. v. Ames, 23 Colo. 167 (1896).

⁴⁰ Carlson v. Phoenix Bridge Co., 132 N. Y. 273 (1892); Promer v. Milwaukee &c. Ry. Co., 90 Wis. 215, 220 (1895). Where the danger is equally known or open to both master and servant, there is no liability on the part of the master. Big Creek Stone Co. v. Wolf, 138 Ind. 496 (1894); Regan v. Dominico, 33 Vr. 30 (1898).

⁴¹ Benzing v. Steinway, 101 N. Y. 547 (1886); Kranz v. Long Island Ry. Co., 123 id. 1 (1890); Hess v. Rosenthal, 160 Ill. 621 (1896); Promer v. Milwaukee &c. Ry. Co., 90 Wis. 215, 220 (1895); Channon v. Sanford Co., 70 Conn. 573 (1898); Comben v. Bellville Stone Co., 30 Vr. 226 (1896); Doyle v. Missouri &c. Trust Co., 140 Mo. 1 (1897);

Middle Georgia &c. Ry. Co. v. Burnett, 104 Ga. 582 (1898).

⁴² Channon v. Sanford Co., 70 Conn. 573 (1898).

⁴³ Kennedy v. Chase, 119 Cal. 637 (1898).

⁴⁴ Benzing v. Steinway, 101 N. Y. 547 (1886); Houston v. Brush, 66 Vt. 331 (1894); Cowan v. Umbagog Pulp Co., 91 Me. 26 (1897); Comben v. Bellville Stone Co., 30 Vr. 226 (1896); Camp v. Hall, 39 Fla. 535 (1897); Leonard v. Kinnare, 174 Ill. 532 (1898). The duty of the master to provide reasonably safe appliances is a personal duty. Edward Hines Lumber Co. v. Ligas, 172 Ill. 315 (1898).

⁴⁵ Carlson v. Phoenix Bridge Co., 132 N. Y. 273 (1892).

⁴⁶ Hickey v. Taaffe, 105 N. Y. 26 (1887); Rummell v. Dilworth, 111 Pa. St. 343 (1885).

ery and appliances with which to work, and the duty of the servant to exercise due care to avoid injury, are reciprocal obligations. The duty of each is measured by the standard of ordinary care.⁴⁷ If safe and proper tools and appliances are supplied by the master, he is not liable for an injury which his servant receives by using, under the direction of the foreman over such servant, a tool or appliance not furnished for, or adapted safely to, the work.⁴⁸

§ 68. *Inspection.* — The law imposes upon the master the duty of inspection and repair, when necessary, and to use ordinary care, diligence and skill to keep the tools, appliances and machinery in good and safe condition.⁴⁹ The duty will be performed by such an inspection as ordinary prudence would dictate.⁵⁰ "The duty of inspection is affirmative, and must be continuously fulfilled, and positively performed."⁵¹ In the absence of notice to the contrary, a servant is entitled to assume that his master has exercised due care and skill in furnishing proper appliances for the work and in keeping them safe.⁵²

⁴⁷ *Hoffman v. American Foundry Co.*, 18 Wash. St. 287 (1897). It is not the absolute duty of the servant, upon entering upon his work, to ascertain the dangers and risks connected therewith. The measure of his duty is ordinary care. *Holman v. Kempe*, 70 Minn. 422 (1897). For a full statement of the law and collection of cases for master's liability to servants for injuries received by coupling cars, see that title in 7 Am. & Eng. Ency. of Law (2d ed.), p. 1046.

⁴⁸ *Maher v. Thropp*, 30 Vr. 186 (1896); *Blackman v. Thomson-Houston Electric Co.*, 102 Ga. 64 (1897); *Cregan v. Marston*, 126 N. Y. 568 (1891); *Johnson v. Boston Towboat Co.*, 135 Mass. 209 (1883); *Kehoe v. Allen*, 92 Mich. 464 (1892).

⁴⁹ *Union Pac. Ry. Co. v. Daniels*, 152 U.S. 684 (1893); *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482 (1891); *North Deutscher Lloyd S. S. Co. v.*

Ingebregsten, 28 Vr. 400 (1894); *Goodrich v. New York &c. R. R. Co.*, 116 N. Y. 398 (1889); *Campbell v. Louisville &c. R. R. Co.*, 109 Ala. 520 (1895); *Comben v. Bellville Stone Co.*, 30 Vr. 226 (1896).

⁵⁰ *Atz v. Newark Lime &c. Mfg. Co.*, 30 Vr. 41 (1896). The master is not liable for an injury occasioned by a defect which would not have been disclosed by such an inspection, as it was his duty to make. *Ib.*

⁵¹ *Brann v. Chicago &c. R. R. Co.*, 53 Iowa, 595, 597 (1880).

⁵² *North Deutscher Lloyd S. S. Co. v. Ingebregsten*, 28 Vr. 400 (1894). In Texas it was held that a railroad brakeman does not assume the risks incident to the negligent inspection of cars, even though he may know that such is the manner of inspection. *Missouri &c. Ry. Co. v. Chambers*, 17 Tex. Civ. App. 487 (1897).

§ 69. Duty to select competent and sufficient fellow servants — To make rules.— The master is bound to use ordinary care in selecting competent servants.⁵³ The duty of the master in this respect is affirmative and positive.⁵⁴ There is a class of cases which hold that the law imposes upon a railroad company the duty to its employes of diligence and care, not only to furnish proper and reasonably safe appliances and machinery and skilled and careful coemployes, but also to make and promulgate rules which, if faithfully observed, will give reasonable protection to the employes.⁵⁵ In a Delaware case, it was said that proper rules for the government of all employes should be made, where the extent of the business exceeds the master's personal supervision.⁵⁶

§ 70. Inexperienced and youthful servants — Instructions and warnings.— An employe, inexperienced in a particular work, which is dangerous from causes not apparent to him, but known to his employer, is entitled to have such information given him as will apprise him of the nature of the work, and the possible risks in its execution.⁵⁷ A young person should be instructed respecting dangerous machinery, and if too young to understand, the employer takes the risk.⁵⁸ He should be placed on a level, as far as practicable, in such respect, with his employer.⁵⁹ When such a duty to give instructions exists, it is an absolute

⁵³ *Wabash &c. Ry. Co. v. McDaniels*, 107 U. S. 454 (1882); *Porter v. Waters-Allen Co.*, 94 Tenn. 370 (1894); *Coppins v. New York &c. R. Co.*, 122 N. Y. 557 (1890); *Gall v. Beckstein*, 173 Ill. 187 (1898). The competency of a servant depends not alone upon physical or mental attributes, but upon the disposition with which he performs his duties. *Coppins v. New York &c. R. R. Co.*, 122 N. Y. 557 (1890).

⁵⁴ *Porter v. Waters-Allen Co.*, 94 Tenn. 370, 372 (1894).

⁵⁵ *Abel v. Delaware &c. Canal Co.*, 103 N. Y. 581 (1886). See *contra*, *Voss v. Delaware &c. R. R. Co.*, 33 Vr. 59 (1898).

⁵⁶ *Rex v. Pullman Palace Car Co.* (Del.), 43 Atl. Rep. 246 (1897).

⁵⁷ *Gates v. State*, 128 N. Y. 221 (1891); *Smith v. Oxford Iron Co.*, 13 Vr. 467, 475 (1880); *Smith v. Hillside &c. Co.*, 186 Pa. St. 28 (1898); *Camp v. Hall*, 39 Fla. 535 (1897); *Addicks v. Christoph*, Vr. ; 43 Atl. Rep. 196 (1899); *Newbury v. Getchel &c. Mfg. Co.*, 100 Iowa, 441 (1896); *McIntyre v. Empire Printing Co.*, 103 Ga. 288 (1897).

⁵⁸ *Hickey v. Taaffe*, 105 N. Y. 26 (1887), reversing 32 Hun, 7; *Fones v. Phillips*, 39 Ark. 17 (1882).

⁵⁹ *Gates v. State*, 128 N. Y. 221, 227 (1891); *De Costa v. Hargraves Mills*, 170 Mass. 375 (1898).

one, and is not performed by delegating it to a third person, who, though competent for that purpose, fails to give the proper information.⁶⁰ An employer who sets a boy sixteen years of age at a dangerous undertaking, knowing that he lacks the strength and skill necessary to do it safely, is guilty of negligence.⁶¹ An employer is bound to give the employe such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position and the necessity there is for the exercise of care and caution. Merely giving the child instructions, "to do as the other boy did," would not be sufficient.⁶² But if a child employed upon machinery has gained from any source, knowledge of the dangers incident to its use, the master's personal neglect to give instructions will not make him liable for the child's hurt, caused by the machinery.⁶³ This rule is applicable to the employment of inexperienced, ignorant, feeble or incompetent servants as well as minors.⁶⁴ Where a servant is set at dangerous work, the mere fact of

⁶⁰ *Wheeler v. Wason Mfg. Co.* Price, 72 Miss. 862 (1895); *Kearney* 135 Mass. 294 (1883); *Addicks v. Electric Co. v. Laughlin*, 45 Neb. Christoph, Vr. ; 43 Atl. Rep. 390 (1895); *Rummell v. Dilworth*, 196 (1899). 111 Pa. St. 343 (1885); *Evansville*

⁶¹ *Noblesville Foundry &c. Co. v. Yeaman*, 3 Ind. App. 521 (1891). 571 (1893); *Louisville &c. R. R. Co.*

⁶² *Sullivan v. India Mfg. Co.*, 113 Mass. 396 (1873); *Coombs v. New Bedford Cordage Co.*, 102 id. 572 (1869); *Addicks v. Christoph*, Vr. 717 (1898); *Consolidated Coal Co. v.*

; 43 Atl. Rep. 196 (1899). In reference to defective machinery the employe must not only know the defects, but he must also know the dangers and risks attending the operation of the machinery by reason of the defects. *Nofsenger v. Goldman*, 122 Cal. 609 (1898). *Jones v. Mfg. &c. Co.*, 92 Me. 565 (1899). The employer is not required to inform a servant of hazards which are so open and obvious as to be plainly apparent to and understood by the servant. *Carlson v. Sioux Falls Water Co.*, 8 S. Dak. 47 (1895); *Cunningham v. Bath Iron Works*, 92 Me. 501 (1899).

⁶³ *Sullivan v. India Mfg. Co.*, 113 Mass. (1873).

⁶⁴ *Mather v. Rillston*, 156 U. S. 391 (1895); *King v. Ford River Lumber Co.*, 93 Mich. 172 (1892); *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225 (1895); *Reynolds v. Boston &c. R. R. Co.*, 64 Vt. 66 (1891); *Illinois Cent. R. R. Co. v.*

his minority does not render the master liable for the risk, if the servant has sufficient capacity to take care of himself and knows and can properly appreciate the risk.⁶⁵ The mere fact of minority does not of and in itself necessarily impose upon the master any other or greater degree of care in respect to the minor than would be upon him had the servant attained full age. It is the immaturity of mental and physical faculties and capacity which is incident to some minors, but not all, and not the mere fact of minority, which the master must have special regard for.⁶⁶ Minor servants are held to assume by their contract of employment, those ordinary risks of their service which are obvious to them or have been pointed out to them in a manner suited to the comprehension of their youth and inexperience.⁶⁷

§ 71. **Delegation by master of his personal duties.**—A master cannot delegate to a servant the performance of his personal duties, so as to exempt himself from liability for his own negligence in causing injury to a servant.⁶⁸ The master cannot relieve himself from liability by delegating this duty.⁶⁹

§ 72. **Liability of servants to third persons or to fellow servants.**—A servant is liable to third persons for misfeasance, but

⁶⁵ Shearm. & Redf. on Neg. (5th ed.), § 218; *Evansville &c. R. R. Co. v. Henderson*, 134 Ind. 636 (1893).

⁶⁶ *Alabama Mineral R. R. Co. v. Marcus*, 115 Ala. 389 (1896).

⁶⁷ *Beckham v. Hillier*, 18 Vr. 12, 14 (1885); *Smith v. Irwin*, 22 id. 507 (1889); *Dunn v. McNamee*, 30 id. 498 (1896); *Greef v. Brown*, 7 Kan. App. 394 (1897). See Shearm. & Redf. on Neg. (5th ed.), §§ 218–219; *Thomas on Neg.* 798.

⁶⁸ *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 647 (1885); *Lewis v. Seifert*, 116 Pa. St. 628 (1887); *Wheeler v. Wason &c. Co.*, 135 Mass. 294 (1893).

⁶⁹ *Brennan v. Gordon*, 118 N. Y. 489 (1890).

&c. R. R. Co., 73 N. Y. 38, 40 (1878);

Chicago &c. R. R. Co. v. Maroney,

170 Ill. 520 (1897). Such as provid-

ing a safe place. *Blazenic v. Iowa*

&c. Coal Co., 102 Iowa, 706 (1897).

The master's duty to give adequate

instructions to a youthful or inex-

perienced servant cannot be dele-

gated so as to make the omission to

give them negligence of a fellow

servant. *Smith v. Hillside &c. Co.*,

186 Pa. St. 28 (1898); *Camp v. Hall*,

39 Fla. 535 (1897); *Addicks v.*

Christoph, Vr. ; 43 Atl. Rep.

196 (1899); Shearm. & Redf. on Neg.

(5th ed.), § 204.

not for nonfeasance.⁷⁰ The servant who has caused the injury is not exempt from liability for his negligence, because his master will also be liable.⁷¹ So one servant at common law is liable to another servant for injuries caused to the latter by the former's negligence, which amounts to misfeasance.⁷² He is not liable to such servant for injuries caused by nonfeasance.⁷³ Nonfeasance is the omission of an act which a person ought to do. Misfeasance is the improper doing of an act which a person might lawfully do. If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable.⁷⁴ The duty to use ordinary care by the agent or servant so as not to injure third persons is a common-law obligation, and is neither increased nor diminished by his entrance upon the duties of the agency, nor can its breach be excused by the plea that his principal is chargeable.⁷⁵ One servant is not responsible to third persons for the negligence of a fellow servant.⁷⁶

§ 73. Liability of municipal corporations — Common law — Statutes.— As a general rule, municipal corporations are not liable to a civil suit for personal injuries, except when the

⁷⁰ *Murray v. Usher*, 117 N. Y. 542 (1889); 46 Hun, 404; *Van Antwerp*

v. Linton, 89 Hun, 417 (1895); 35 N. Y. Supp. 318; *Baird v. Shipman*, 33

Ill. App. 503 (1889); affirmed, 132

Ill. 16. See *Harriman v. Stowe*, 57

Mo. 93 (1874); *Blue v. Briggs*, 12

Ind. App. 105 (1894); *Richardson v.*

Kimball, 28 Me. 463 (1848); *Mayer*

v. Thompson-Hutchinson Building

Co., 104 Ala. 611 (1894). This rule

is said to be different as affects the

liability of shipmasters. *Shearm. &*

Redf. on Neg. (5th ed.), § 246.

⁷¹ *Foulkes v. Metropolitan Dist.*

Ry. Co., L. R., 4 C. P. D. 267, 275

(1879); *Mayer v. Thompson-Hutch-*

inson Building Co., 104 Ala. 611, 623 (1894).

⁷² *Griffiths v. Wolfram*, 22 Minn.

185 (1875); *Osborne v. Morgan*, 130

Mass. 102 (1880); *Hare v. McIntire*,

82 Me. 240 (1890); *Greenberg v.*

Whitcomb Lumber Co., 90 Wis. 225

(1895); *Rogers v. Overton*, 87 Ind.

410 (1882); 2 *Thomp. on Neg.* 1062.

⁷³ *Burns v. Pethcal*, 75 Hun, 437

(1894); 27 N. Y. Supp. 499.

⁷⁴ *Martin, J.*, in *Burns v. Peth-*

cal, 75 Hun, 437, 443 (1894).

⁷⁵ *Baird v. Shipman*, 33 Ill. App.

503 (1889).

⁷⁶ *Brown v. Lent*, 20 Vt. 529

(1848).

right of action is given by statute.⁷⁷ No civil action could be maintained against municipal corporations, at common law, for personal injuries caused by defective highways.⁷⁸ Stated in broader terms, the rule is, that at common law an action will not lie in behalf of an individual who has sustained special damage by reason of the neglect of a public corporation to perform a public duty.⁷⁹ An examination of the decisions on this subject will disclose a great discordance in judicial opinions. The subject is reviewed in an exhaustive opinion citing and commenting upon all the principal cases, English and American, up to that date, by Mr. Chief Justice Gray of the Supreme Court of Massachusetts, now a justice of the Supreme Court of the United States, in which he reached the conclusion in harmony with the rule above stated, viz.: that a private action cannot be maintained against a public corporation for a neglect of corporate duty, unless such action is given by statute.⁸⁰ The United States Supreme Court, in an elaborate opinion by Mr. Justice Hunt, reached an opposite conclusion and said: "The authorities establishing the doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them."⁸¹ This case is reviewed and criticised by Mr. Justice Gray in the case cited above. It will be observed,

⁷⁷ *Mitchell v. City of Rockland*, Mass. 344 (1877); *Bigelow v. Inhabitants of Randolph*, 14 Gray, 541 (1860); *Taggart v. City of Fall River*, 170 Mass. 325 (1898). See *52 Me. 125* (1860). See *Edgerly v. Concord*, 62 N. H. 8 (1882); *Barnes v. District of Columbia*, 91 U. S. 540 (1875).

⁷⁸ 2 *Dillon on Mun. Corps.*, §§ 761, 764, 786; *Elliott on Roads & Streets*, chap. 23, p. 444; *Shirley's Leading Cases*, 40; *Whitaker's Smith on Neg.* 108; *Shearm. & Redf. on Neg.* (5th ed.), § 337; *Hyde v. Town of Jamaica*, 27 Vt. 443 (1855); 9 *Am. City of Fall River*, 170 Mass. 325 & *Eng. Ency. of Law* (1st ed.), (1898).
⁷⁹ 21 *Vr.* 246 (1888). There are some exceptions to this rule; a city or town is sometimes held liable to a private action when it derives a profit or advantage from the performance of the duty. *Taggart v. City of Fall River*, 170 Mass. 325 (1898).

⁸⁰ *Livermore v. Board of Freeholders of Camden*, 2 *Vr.* 507 (1864); *Pray v. Mayor &c. Jersey City*, 3 id. 394 (1868); *City of Detroit v. Blackeby*, 21 *Mich.* 84 (1870).
⁸¹ *Barnes v. District of Columbia*, 91 U. S. 540, 551 (1875). The doctrine of that case was again affirmed by the Supreme Court of the United States in the case of *District of Columbia v. Woodbury*, 136 U. S. 450 (1899).

⁸⁰ *Hill v. City of Boston*, 122

however, that the case in the United States Supreme Court was decided by a bare majority of the court, and that Messrs. Justices Swaine, Field, Strong and Bradley dissented. The liability of a municipal corporation for personal injuries, caused by negligence, depends upon the true interpretation of the statute by which it is created.⁸² It is doubtful if a municipal corporation can knowingly ratify the negligent act of its officers.⁸³ The rule exempting municipal corporations from liability grows out of the principle that a State cannot be made liable to an action for neglect or misfeasance of its officers, through which a person is injured, unless some statute creates the liability.⁸⁴ The courts in some of the States, when interpreting the statutes under which they are incorporated, make a distinction in holding one class liable when no express liability is imposed, such as cities and the like, while exempting the other class from such liability, such as counties, towns or districts, when the language of the statute under which they are created is substantially identical in both classes.⁸⁵ In the United States Supreme Court it was said that whether or not this distinction is based upon sound principle, is so well settled that it cannot be disturbed.⁸⁶ As a general rule a city, town, township, school or road district is not liable to a private action for a breach of duty causing personal injury, except when expressly imposed by statute. No liability, therefore, will be implied.⁸⁷ In New Jersey it is the settled law of that State, affirmed in many decisions, that an action will not lie, in behalf of an individual who has sustained a special damage from the neglect of a municipal corporation to per-

⁸² *Southampton &c. Bridge Co. v. Southampton Board*, 8 El. & B. 801, 812 (1858); *Sanitary Commissioners of Gibraltar v. Orfila, L. R.*, 15 App. Cas. 400 (1890); *Rapho v. Moore*, 68 Pa. St. 404, 406 (1871).

⁸³ *Mitchell v. City of Rockland*, 52 Me. 125 (1860). The term municipal corporation includes all the political subdivisions of the State, such as counties, towns, townships, cities, villages, school and road districts. They are mere agencies of the State government.

⁸⁴ *City of Galveston v. Posnain-sky*, 62 Tex. 118 (1884); *Eastman v. Meredith*, 36 N. H. 284 (1858).

⁸⁵ *Dillon on Mun. Corp.*, § 1023a; *Shearm. & Redf. on Neg.* (5th ed.), § 256; *Elliott on Roads & Streets*, p. 322; 1 *Thompson on Neg.* 618.

⁸⁶ *Barnes v. District of Columbia*, 91 U. S. 540 (1875).

⁸⁷ *Shearm. & Redf. on Neg.* (5th ed.), § 256, where a collection of cases and statutes will be found arranged according to States. *Elliott on Roads & Streets*, p. 324..

form a public duty, unless the right to sue for such an injury is given by statute.⁸⁸

§ 74. **Liability of municipal corporations — Highways.**—The powers, duties and liabilities of towns in regard to highways and bridges originate in, depend upon, and are limited by, the statutes.⁸⁹ In many of the States there are statutes imposing upon municipal corporations a liability for personal injury caused by defects in, or nonrepair of, highways.⁹⁰ Or where the control of the streets is intrusted by charter or general statute to a city, town or village, they are held liable to a private action at the suit of an individual injured by defects caused through a failure to exercise ordinary care and diligence.⁹¹ A municipal corporation is not an insurer against all defects in its highways and does not warrant that highways are safe.⁹² The duty cast upon a municipal corporation to keep its streets in a safe condition for travel is not absolute.⁹³ Its liability depends in all cases upon negligence; that is, upon the fact whether it has omitted to exercise due care, under the circumstances, in their maintenance and repair.⁹⁴ Their duty is to use ordi-

⁸⁸ *Waters v. Mayor &c. Newark*, 27 Vr. 361 (1894); affirmed, 28 id. 456; *Mayor &c. Jersey City v. Kiernan*, 21 id. 246 (1888); *Livermore v. Board of Freeholders of Camden*, 2 id. 507 (1864); *Pray v. Mayor &c. of Jersey City*, 3 id. 394 (1868); *Condict v. Mayor &c. of Jersey City*, 17 id. 157 (1884); *Carter v. Mayor &c. Rahway*, 26 id. 177 (1893); affirmed, 28 id. 196.

⁸⁹ *Abendroth v. Town of Greenwich*, 29 Conn. 356, 362 (1860).

⁹⁰ *Shearm. & Redf. on Neg.* (5th ed.), § 338; id., § 289, and cases cited.

⁹¹ "And it is conceived that outside of New England, the rule, even where the duty is not specifically enjoined, is that a municipal corporation which is given exclusive control over its streets, together with means to repair and maintain them, is in duty bound to exercise

the power granted so far as to make its streets reasonably safe and convenient; and if it fails to do so, it is liable for any injury occasioned by its neglect to perform such duty. This is certainly the rule which has found favor with the great majority of the courts."

⁹² *Hunt v. Mayor &c. of New York*, 109 N. Y. 134 (1888); *Burns v. City of Bradford*, 137 Pa. St. 361 (1891); *Hixon v. City of Lowell*, 13 Gray, 59 (1859); *City of Indianapolis v. Cook*, 99 Ind. 10, 15 (1884); *Elliott on Roads & Streets*, p. 448; *Moore v. City of Richmond*, 85 Va. 538 (1888); *City of Michigan v. Boeckling*, 122 Ind. 39 (1889).

⁹³ *Hunt v. Mayor &c. of New York*, 109 N. Y. 134 (1888).

⁹⁴ *Hunt v. Mayor &c. of New York*, 109 N. Y. 134 (1888); *Burns v. City of Bradford*, 137 Pa. St.

nary care to make the highways reasonably safe and convenient for ordinary travel.⁹⁵ The basis of the action for an injury sustained because of a defect in a street is the negligence of the municipal corporation in failing to keep the street in a reasonably safe condition for travel. If there is no breach of this duty there is no right of action, and if there is no want of ordinary care there is no breach of duty.⁹⁶ The same duty is required of a municipality, in reference to sidewalks and street crossings,⁹⁷ to keep them free from overhanging roofs,⁹⁸ such as a cornice of a building projecting over a sidewalk,⁹⁹ or an awning,¹ or branches of a tree from overhanging the travelled part of a road,² or objects that are calculated to frighten horses,³ such as machinery left on the roadside,⁴ or water escaping from a water pipe in a street, with a hissing sound.⁵ So, where it

361 (1891); *Massey v. Mayor &c. of Columbus*, 75 Ga. 658 (1885); *Brown v. Town of Mt. Holly*, 69 Vt. 364 (1897); *Seward v. Mayor &c. of Wilmington*, 2 Marvel, 189 (1896, Del.); *id.* 306 (1897). See *Shearm. & Redf. on Neg.* (5th ed.), § 367; *Elliott on Roads & Streets*, p. 448.

⁹⁵ *Lane v. Town of Hancock*, 142 N. Y. 510 (1894); *Lohr v. Phillipsburg Borough*, 156 Pa. St. 246 (1893); *Moore v. City of Richmond*, 85 Va. 538 (1888); *Michigan City v. Boeckling*, 122 Ind. 39 (1889); *Shelley v. City of Austin*, 74 Tex. 608 (1889); *McClure v. City of Sparta*, 84 Wis. 269 (1893); *City of Indianapolis v. Cook*, 99 Ind. 10 (1884); *Sutton v. City of Snohomish*, 11 Wash. St. 24 (1895).

⁹⁶ *Elliott, J.*, in *Michigan City v. Boeckling*, 122 Ind. 39, 40 (1889).

⁹⁷ *Shearm. & Redf. on Neg.* (5th ed.), § 353, and cases there cited; *Durant v. Palmer*, 5 Dutch. 544 (1862); *Bishop v. Village of Goshen*, 120 N. Y. 337 (1890). Case of an unguarded areaway extending into the sidewalk. *McNerney v. Reading City*, 150 Pa. St. 611 (1892); *Feather v. Reading*, 155 id. 187

(1893). Case of open hatchway in the sidewalk. *McClure v. City of Sparta*, 84 Wis. 269 (1893); *Hogan v. City of Chicago*, 168 Ill. 551 (1897); *Vogelgesang v. City of St. Louis*, 139 Mo. 127 (1897).

⁹⁸ *Shearm. & Redf. on Neg.* (5th ed.), § 354; *Elliott on Roads & Streets*, p. 454.

⁹⁹ *Grove v. City of Ft. Wayne*, 45 Ind. 429 (1874).

¹ *Bieling v. City of Brooklyn*, 120 N. Y. 98 (1890).

² *Embler v. Town of Wallkill*, 132 N. Y. 222 (1892).

³ *Shearm. & Redf. on Neg.* (5th ed.), § 355; *Elliott on Roads & Streets*, p. 448; *Bennett v. Fifield*, 13 R. I. 139 (1880).

⁴ *Bennett v. Lovell*, 12 R. I. 166 (1878); *Bennett v. Fifield*, 13 id. 139 (1880).

⁵ *Baker v. North East Borough*, 151 Pa. St. 234 (1892). Piles of lumber at the roadside and projecting into the highway. *North Manheim Township v. Arnold*, 119 Pa. St. 380 (1888). See *City of Vandalia v. Huss*, 41 Ill. App. 517 (1891). *Steam-roller. Mullen v. Glens Falls*, 42 N. Y. Supp. (1896) 113; *Nilan v.*

authorizes a temporary interference with its highways for a legitimate purpose, which is intrinsically dangerous, it is bound to use the same degree of care for the protection of travellers as if the work was being done by its own agents for its own benefit.⁶ Or, where it has employed a contractor to do work involving an excavation of its streets, it is not absolved from its duty and responsibility.⁷ A city is under no obligation to light its streets, and its mere neglect to do so is not a ground of liability, unless the charter expressly imposes the duty.⁸ Nor is a city bound to remove from the roadway or bed of the street ridges of snow accumulated from clearing a crosswalk.⁹ It may be stated as a general rule that wherever railings or barriers are necessary for the safety of travellers, it is negligence not to construct and maintain them.¹⁰

§ 75. Liability of municipal corporations — Notice.— As a general proposition that before the municipal authorities can be held liable in this class of cases, it must be shown that they knew of the existence of the cause of the injury, or had been notified of it, or such a state of circumstances must be shown that notice would be implied.¹¹ Many of the statutes provide

Richmond Gas Light Co., 1 App. Div. 234 (1896); 37 N. Y. Supp. 259; Rowell v. Stamford Street R. R. Co., 64 Conn. 376 (1894). Cars. Ohio &c. Ry. Co. v. Trowbridge, 126 Ind. 391 (1891); Jones v. Snow, 56 Minn. 214 (1893); Moore v. Kansas City &c. Ry. Co., 126 Mo. 265 (1894).

⁶ Shearm. & Redf. on Neg. (5th ed.), § 358; McCoull v. City of Manchester, 85 Va. 579 (1888); Blessington v. City of Boston, 153 Mass. 409 (1891); City of Zanesville v. Fannan, 53 Ohio St. 605 (1895); Wheeler v. City of Plymouth, 116 Ind. 158 (1888).

⁷ Turner v. City of Newburgh, 109 N. Y. 301 (1888); Elliott on Roads & Streets, p. 466.

⁸ City of Freeport v. Isbell, 83 Ill. 440 (1876); Gaskins v. City of Atlanta, 73 Ga. 746 (1884); Elliott

on Roads & Streets, p. 457; Whart. on Neg., § 973.

⁹ Lichtenstein v. Mayor &c. of New York, 159 N. Y. 500 (1899).

¹⁰ Elliott on Roads & Streets, p. 453; Orme v. City of Richmond, 79 Va. 86 (1884); Niblett v. Mayor &c. of Nashville, 12 Heisk. 684 (1874); Scott Township v. Montgomery, 95 Pa. St. 444 (1880); Plymouth Township v. Graver, 125 id. 24 (1889); Olson v. City of Chippewa Falls, 71 Wis. 558 (1888).

¹¹ Mayor &c. of New York v. Sheffield, 4 Wall. 189, 195 (1866); District of Columbia v. Woodbury, 136 U. S. 450 (1889); Rowe v. City of Portsmouth, 56 N. H. 291 (1876); Stein v. City of Council Bluffs, 72 Iowa, 180 (1887); City of La Salle v. Porterfield, 138 Ill. 114 (1891); Pomfrey v. Saratoga Springs, 104 N. Y. 459 (1887); Burns v. City of

that, for defects in highways, the town shall have had "reasonable notice" of the defect, or that the defect shall have existed a specified length of time previous to the occurrence.¹²

§ 76. Liability for injuries from the use of private premises.—

"The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy."¹³ If one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks

Bradford, 137 Pa. St. 361 (1891); (5th ed.), § 333; Elliott on Roads & District of Columbia v. Payne, 13 Streets, p. 1.

App. Cas. (D. C.) 500 (1898); Elliott on Roads & Streets, p. 463.

¹² Shearm. & Redf. on Neg. (5th ed.), § 367. In the absence of such provision, the town's liability is absolute, and proof of notice is not necessary to a recovery. *Ib.*; Chapman v. Milton, 31 W. Va. 384 (1888); Evans v. City of Huntington, 37 id. 601 (1893); Raasch v. Dodge County, 43 Neb. 508 (1895). For a collection and digest of cases on the point as to what constitutes actual notice and when notice will be implied, see Shearm. & Redf. on Neg. (5th ed.), §§ 368, 369, 373.

If a way is used for passing and repassing, and is common to all the people, it is a highway, whether it is called a road, street or public square. Prentiss, C. J., in *State v. Wilkinson*, 2 Vt. 480 (1829). The term "highway" is generic, inclusive of all public ways, and means a public road which every person has a right to use for passage and traffic. Shearm. & Redf. on Neg.

For a comprehensive statement of the common law and statutory liability of municipal corporations for personal injuries caused by negligence, with a citation of many authorities illustrating this general subject, the reader is referred to the text-books. Shearm. & Redf. on Neg. (5th ed.), chap. 15, § 332 *et seq.*; Elliott on Roads & Streets, chap. 23; Dillon on Mun. Corp. (2d ed.), chap. 23; 15 Am. & Eng. Ency. of Law (1st ed.), p. 1141; Thomas on Neg., p. 983.

¹³ Andrews, C. J., in *Booth v. Rome & C. R. R. Co.*, 140 N. Y. 267, 277 (1893). "Whether a particular act or thing constitutes a nuisance may depend on the circumstances and surroundings." *Ib.* 277. * * * "The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance." *Ib.* 277.

of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part.¹⁴

§ 77. **Explosions — Blasting.**— The general rule is that one is not liable for the explosion of boilers, or explosive substances, on his own premises, unless the same resulted from his negligence,¹⁵ or the keeping of gunpowder.¹⁶ The keeping or manufacturing of gunpowder or fireworks does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used.¹⁷ “To constitute a nuisance for keeping in store articles in common use in a community, the substance must be of such a nature and kept in such large quantities and under such circumstances as to create real danger to life and property. The fears of mankind will not alone create a nuisance without the presence of real danger.”¹⁸ When it becomes a public nuisance, any one injured in person or property by the explosion of powder stored, or other substances highly explosive, may recover damages without proof of negligence in its operation.¹⁹ Whether the par-

¹⁴ Angel on Watercourses, § 336; *Kinney v. Koopman*, 116 Ala. 310, 332 (1896); *Weir's Appeal*, 74 Pa. 487 (1873); *Livingston v. Adams*, 8

Cow. 175 (1828). This is in conflict with the English rule as declared in the case of *Fletcher v. Rylands*, L. R., 1 Exch. 265 (1866); affirmed, L. R., 3 H. L. 330 (1868); *Fletcher v. Smith*, L. R., 7 Exch. 305 (1872); affirmed, 2 App. Cas. 781 (1877). See § 18.

¹⁵ *Losee v. Buchanan*, 51 N. Y. 476 (1873), reversing 61 Barb. 86; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118 (1890); *Marshall v. Welwood*, 9 Vr. 339 (1876); *The Nitro-Glycerine Case*, 15 Wall. 524 (1872); *Walker v. Chicago &c. Ry. Co.*, 71 Iowa, 658 (1887).

¹⁶ *Heeg v. Licht*, 80 N. Y. 579 (1880).

¹⁷ *Ib.*; *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413 (1895);

¹⁸ *Barker, J., Lee v. Vacuum Oil Co.*, 54 Hun, 156, 162 (1889). The laying and maintaining of the pipes for the transportation through them of oil did not *per se* constitute a nuisance. *Ib.* See 16 Am. & Eng. Ency. of Law (1st ed.), p. 293; *Lafin &c. Powder Co. v. Tearney*, 131 Ill. 322 (1890).

¹⁹ Powder and nitro-glycerine. *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413 (1895). Explosion of a powder magazine. *Lafin &c. Powder Co. v. Tearney*, 131 Ill. 322 (1890). Nitro-glycerine. *Judson v. Grant Powder Co.*, 107 Cal. 549 (1895); *Schoepper v. Hancock Chemical Co.*, 113 Mich. 582 (1897). Glycerine. *St. Mary's Woolen Mfg. Co. v. Bradford Gly-*

ticular act or thing complained of constitutes a nuisance may depend on the circumstances and surroundings.²⁰ One who, in the process of blasting upon his land adjoining the highway, inflicts physical injuries upon one lawfully on the highway by throwing stones, wood or other objects from the blast against the person of the traveller, is a wrongdoer. He is responsible as such, no matter how carefully the blasting is carried on.²¹ When the act is in itself unlawful, it is immaterial whether it is done ignorantly, negligently, or purposely, except in the measure of damages. Every person must so use his property and exercise his rights as not to injure the property or restrict the rights of others.²² But where there is no physical contact with the objects thrown by the blast, there is no liability without proof of negligence in the process of blasting, which proximately caused the injury.²³

§ 78. **Unwholesome and offensive occupations.**— One carrying on an unwholesome and offensive occupation on his own premises, though lawful, but in such a manner as to prove a nuisance to his neighbor, is liable in damages; the law of negligence has

cerine Co., 14 Ohio C. Ct. 522 (1897). 337 (1876); Hay v. Cohoes Co., 2 On appeal. 54 N. E. Rep. 528 N. Y. 159 (1849), followed. See (1899). Dynamite. Clarkin v. Ziwabik-Bessemer Co., 65 Minn. 483 (1897); 43 N. Y. Supp. 1; Gates v. (1896); Wood on Law of Nuisances, Latta, 117 N. C. 189 (1895). § 73 *et seq.* 22 Wright v. Compton, 53 Ind.

20 Booth v. Rome &c. R. R. Co., 337, 341 (1876). 140 N. Y. 277 (1893); Cameron v. Kenyon-Connell Co., Mont. 140 N. Y. 267 (1893); Benner v. Atlantic Dredging Co., 134 id. 156 (1892), reversing 58 Hun, 359; Simmons v. McConnell, 86 Va. 494 (1890); Blackwell v. Lynchburg &c. R. R. Co., 111 N. C. 151 (1892); Gates v. Latta, 117 id. 189 (1895); decided under Rev. Stat., chap. 17, §§ 23, 24; Wadsworth v. Marshall, 88 Me. 263 (1896). *Contra* in a large city: "Such use is unreasonable, unusual and unnatural." Cotton v. Onderdonk, 69 Cal. 155 (1886); Monroe v. Pacific &c. Co., 1083; Wright v. Compton, 53 Ind. 84 id. 515 (1890).

21 Sullivan v. Dunham, 10 App. Div. 438 (1896); 41 N. Y. Supp. 1083; Wright v. Compton, 53 Ind. 84 id. 515 (1890).

no application and the law of nuisance applies.²⁴ Where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application and the law of nuisance applies.²⁵

§ 79. **Licensees — Trespassers.**— There are many cases in the books where persons have been injured while on private premises. The general rule is said to be that the owner of private premises owes no duty to a person going thereon without invitation, express or implied, nor to one who is upon the premises by mere license.²⁶ One who enjoys a mere permission to pass over dangerous lands is only relieved from being a trespasser, and must assume all the ordinary risks attached to the nature of the place or the business carried on there.²⁷ When a person goes upon the land of another, without invitation, to secure employment from the owner of the land, he is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey. Although it may be shown that the owner might have ascertained the defect by the exercise of reasonable care, he owes no legal duty to a stranger so coming upon his premises, which requires him to keep the machinery in repair.²⁸ A manufacturer or

²⁴ Wood on Nuis., § 497. Manufacturing gas from naphtha which emitted disagreeable and offensive odors. *Bohan v. Port Jervis &c. Co.*, 122 N. Y. 18 (1890). Smoke, soot, cinders and coal dust from engine-house and coal-bins. *Cogswell v. New York &c. R. R. Co.*, 103 N. Y. 10 (1886). Blasting rocks with gunpowder. *Hay v. Cohoes Co.*, 2 N. Y. 159 (1849). Storage of petroleum. *Gavigan v. Atlantic Refining Co.*, 186 Pa. St. 604 (1898); *Weir's Appeal*, 74 id. 230 (1873).

²⁵ *Bohan v. Port Jervis &c. Co.*, 122 N. Y. 18, 26 (1890); *Campbell v. United States Foundry Co.*, 73 Hun, 576 (1893); *Gavigan v. Atlantic Refining Co.*, 186 Pa. St. 604 (1898).

²⁶ *Thomas on Neg.* 1077; *Cusick v. Adams*, 115 N. Y. 55 (1889); *Walker v. Winstanley*, 155 Mass. 301 (1892); *Bedell v. Berkey*, 76 Mich. 435 (1889); *Stevens v. Nichols*, 155 Mass. 472 (1892); *Evansville &c. R. R. Co. v. Griffin*, 100 Ind. 221 (1884); *Schmidt v. Kansas City &c. Co.*, 90 Mo. 284 (1886); *Blackstone v. Chelmsford Foundry Co.*, 170 Mass. 321 (1898); *Dobbins v. Missouri &c. Ry. Co.*, 91 Tex. 60 (1897).

²⁷ *Vanderbeck v. Hendry*, 5 Vr. 467 (1871). See *Missouri &c. Ry. Co. v. Edwards*, 90 Tex. 65 (1896).

²⁸ *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391 (1886); *Stenger v. Van Sicklen*, 132 id. 499 (1892); *Benson v. Baltimore Traction Co.*,

other owner is not bound to fence his dangerous machinery in favor of a simple licensee.²⁹ The owner of an unfinished building is under no obligation to make it safe for strangers attracted there by curiosity.³⁰ On the other hand, where the owner of private premises, in the prosecution of his own purpose or business, or of a purpose or business in which there is a common interest, invites another, either expressly or impliedly, to come upon his premises, he cannot, with impunity, expose him to unreasonable or concealed dangers,³¹ as in places of business,³² or amusement.³³ A person erecting and using a hall for exhibitions must use reasonable care in the construction, maintenance and management of it, having regard to the character of the exhibitions given and the customary conduct of spectators who witness them, and the acts of the plaintiff must be judged according to the conduct which ordinarily prudent people show under like circumstances.³⁴ He is only bound to use reasonable

77 Md. 535 (1893); *Stevens v. Nichols*, 155 Mass. 472 (1892); *Faris v. Hoberg*, 134 Ind. 269 (1892); *Galveston Oil Co. v. Morton*, 70 Tex. 400 (1888). For a collection and citation of many cases, see *Shearm. & Redf. on Neg.* (5th ed.), § 705.

²⁹ *Mathews v. Bense*, 22 Vr. 30 (1888).

³⁰ *Roulston v. Clark*, 3 E. D. Smith, 366 (1854); *Peake v. Buell*, 90 Wis. 508 (1895); *Witte v. Stifel*, 126 Mo. 295 (1895).

³¹ *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 395 (1886); *Snaith v. London & Co. Docks Co.*, L. R., 3 C. P. 326 (1868); *Holmes v. North Eastern Ry. Co.*, L. R., 4 Exch. 254 (1869); affirmed, 6 id. 123; *Davis v. Central Cong. Soc.*, 129 Mass. 367, 371 (1880); *Stucke v. New Orleans R. R. Co.*, 50 La. Ann. 172 (1898). So trap-doors, hoistways, elevator shafts and similar openings in floors should be protected so that no one exercising ordinary prudence could fall through them. *Shearm. & Redf. on Neg.* (5th ed.), § 719, and cases cited.

³² *Shearm. & Redf. on Neg.* (5th ed.), § 704; *Ackert v. Lansing*, 59 N. Y. 646 (1874); *McRicard v. Flint*, 114 id. 222 (1889); *Flynn v. Central R. R. Co. of New Jersey*, 142 id. 439 (1894). Plaintiff, a customer in a store, had an eye put out by a pin snapped or shot by a cash boy. *Swinarton v. Le Boutillier*, 7 Misc. 639 (1894); *Hawkins v. Johnson*, 105 Ind. 29 (1885); *Brosnan v. Sweetser*, 127 id. 1 (1890).

³³ *Latham v. Roach*, 72 Ill. 179 (1874); *Currier v. Boston Music Hall Assn.*, 135 Mass. 414 (1883).

³⁴ *Schofield v. Wood*, 170 Mass. 415, 418 (1898). It is said that the liability of a landowner to an invited guest, having no business relations with him, is not yet thoroughly settled. *Shearm. & Redf. on Neg.* (5th ed.), § 706. The host should always be held responsible to the guest for gross negligence. See *Abraham v. Reynolds*, 5 Hurlst. & N. 143 (1860); *Tebbritt v. Bristol & Co. Ry. Co.*, L. R., 6 Q. B. 73 (1870); *Sweeney v. Old Colony & Co. R. R. Co.*, 10 Allen,

care and prudence to keep his premises in such condition that visitors may not be unnecessarily or unreasonably exposed to danger.³⁵

§ 80. **Spring guns.**—The owner of private premises cannot, without giving any warning, place thereon spring guns or dangerous traps, which may subject a person, innocently going on the premises, although without actual permission or license, to injury, without incurring liability.³⁶ The reason is said to be that the value of human life forbids measures for the protection of the possession of real property against a mere intruder, which may be attended with such ruinous consequences. The duty in such case grows out of the circumstances, independently of any question of license to enter the premises.³⁷

§ 81. **Children — Conflicting decisions.**—The rule that the owner of private premises owes no duty to trespassers or licensees except to abstain from acts willfully injurious, in some jurisdictions, has been modified when applied to children *non sui juris*. In such cases the owner of private premises, it has been held, should use reasonable care not to permit, unguarded, upon his premises machinery, structures, pitfalls or other dangerous conditions to which children would be likely to be attracted, in proximity to places frequented by them, and from an interference with which injury to them would be likely to result.³⁸ Children, wherever they go, must

368 (1865); *Baker v. Tibbetts*, 162 Mass. 468 (1895); *Davis v. Central Congregational Soc.*, 129 id. 367 (1880); *Howe v. Ohmart*, 7 Ind. App. 32 (1893).

³⁵ *Larkin v. O'Neill*, 119 N. Y. 221 (1890), reversing 48 Hun, 591; *Nichols v. Washington & C. R. R. Co.*, 83 Va. 99 (1887). The mere fact that one is injured while on the premises is no evidence of negligence on the part of the owner. *Larkin v. O'Neill*, 119 N. Y. 221 (1890). One tumbling down stairs. *Pinney v. Hall*, 156 Mass. 225 (1892); *Johnson v. Ramberg*, 49 Minn. 341 (1892).

³⁶ *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 394 (1886). Arsenic mixed with India meal to prevent fowls from trespassing. *Johnson v. Patterson*, 14 Conn. 1 (1840). So by statute in England, 7 & 8 Geo. IV, chap. 18; 24 & 25 Vict., chap. 100, § 31.

³⁷ *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 394 (1886).

³⁸ *Thomas on Neg.* 1078, 1083; *Shearm. & Redf. on Neg.* (5th ed.), § 705; *Lynch v. Nurdin*, 1 Q. B. 29 (1841); *Sioux City & C. R. R. Co. v. Stout*, 17 Wall. 657 (1873). Turntable of a railroad. *Beach on Cont. Neg.* (3d ed.), §§ 157–139; *Walsh v.*

be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly.³⁹ In Texas the Supreme Court of that State held that the owner of private premises owes no duty to trespassers whether infant or adult.⁴⁰ In that case the court dissented from and criticised the doctrine of the Turn Table cases and those which follow it.⁴¹ In the case cited from the New Jersey reports, Mr. Justice Gummere, in a strong, well-reasoned opinion, while speaking for the Court of Errors and Appeals, stated

Fitchburg R. R. Co., 78 Hun, 1 (1894); 67 id. 604 (1893); reversed, 145 N. Y. 301 (1895); Indianapolis &c. Ry. Co. v. Pitzer, 109 Ind. 179 (1886).

³⁹ Schmidt v. Kansas City &c. Co., 90 Mo. 284 (1886); Kentucky Central R. R. Co. v. Gastineau, 83 Ky. 119 (1885). Turn-table of a railroad. Kansas City Ry. Co. v. Fitzsimmons, 22 Kan. 686 (1879). Turn-table of a railroad. O'Malley v. St. Paul &c. Ry. Co., 43 Minn. 289 (1890). Turn-table. Barrett v. Southern Pacific Co., 91 Cal. 296 (1891); Branson v. Labrot, 81 Ky. 638 (1884); Penso v. McCormick, 125 Ind. 116 (1890). Dynamite cartridge marked powder found and cracked by small boy; owner and landlord liable. Powers v. Harlow, 53 Mich. 507, 515 (1884). Slack from a coal mine in an open lot. Union Pacific Ry. Co. v. McDonald, 152 U. S. 262 (1893). Excavations by a municipal corporation on private lands. Mackey v. City of Vicksburg, 64 Miss. 777 (1887). Child swinging upon a gate which fell. Chicago &c. R. R. Co. v. Bockoven, 53 Kan. 279 (1894). Deep pit in a populous city. City of Pekin v. McMahon, 154 Ill. 141 (1895). Child walking into a pool of hot water. Brinkley Car Co. v.

Cooper, 60 Ark. 545 (1895). Boy drowned while bathing in a pond on a lot not fenced. Moran v. Pullman Palace Car Co., 134 Mo. 641 (1896). For a collection of cases, see 7 Am. & Eng. Ency. of Law (2d ed.), p. 404.

⁴⁰ Dobbins v. Missouri &c. Ry. Co., 91 Tex. 60 (1897). In that case a child fell into a pool of water on private premises. Missouri &c. Ry. Co. v. Edwards, 90 Tex. 65 (1896).

⁴¹ Such as Sioux City &c. R. R. Co. v. Stout, 17 Wall. 657 (1873). The same rule has been adopted by the States of

Massachusetts: Turn-table. Daniels v. New York &c. R. R. Co., 154 Mass. 349 (1891).

New Hampshire: Frost v. Eastern R. R. Co., 64 N. H. 220 (1886). A landowner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant does not raise a duty where none otherwise exists. *Ib.*

New Jersey: Case of a young child injured on a turn-table. Delaware &c. R. R. Co. v. Reich, 32 Vr. 635 (1898); Turess v. New York &c. R. R. Co., id. 314 (1898).

New York: Walsh v. Fitchburg R. R. Co., 145 N. Y. 301 (1895).

the rule of law to be: The general rule with regard to the duty which a landowner owes to persons coming upon his premises is that where the entry is made by his invitation, either express or implied, he is required to use reasonable care to have his premises in a safe condition; but that where the entry is made merely by his permission (and *a fortiori* where it is an actual trespass), the landowner is under no obligation to keep his premises in a nonhazardous state; his only duty to a licensee or a trespasser is to abstain from acts willfully injurious, and the fact that the licensee or the trespasser is an infant of tender years affords no reason for modifying this rule and charging the landowner with a duty which does not otherwise exist.

§ 82. **Public officers.**— It is a general rule of law that public officers, when not negligent themselves in the selection of their subordinates, are not personally liable to third persons for personal injury caused by the negligence of their subordinates, agents, servants or clerks, necessarily and properly employed by, or under, them in the discharge of their official duties.⁴² They are liable for their own personal negligence or default in the discharge of their duties and also for the negligence or default of their private agents or servants in the discharge of their official duties.⁴³

§ 83. **Public trustees.**— In England, statutory bodies, such as incorporated public trustees, although not organized for profit and administering a fund raised by statute, are liable in an action for negligence of themselves or their employes in the line of their duty causing damage to third persons.⁴⁴ A mem-

⁴² Shearm. & Redf. on Neg. (5th Miss. 197 (1880); Peart v. Meeker, ed.), chap. 13, § 319; Elliott on 45 La. Ann. 421 (1893).

Roads & Streets, chap. 25; Thomas ⁴³ Sawyer v. Corse, 17 Gratt. 230 on Neg., p. 36; Donovan v. Mc- (1867).

Alpine, 85 N. Y. 185 (1881); id. 117 ⁴⁴ Shearm. & Redf. on Neg. (5th ed.), §§ 326, 327; Mersey Docks v. liable. Walsh v. Trustees &c. of Gibbs, L. R., 1 H. L. 93 (1864); 11 Bridge, 96 N. Y. 427 (1884); H. L. Cas. 686; Winch v. Con- servators of the Thames, L. R., 7 (1839); City of Richmond v. Long, C. P. 458 (1872); affirmed, L. R., 17 Gratt. 375 (1867); Sawyer v. 9 id. 378 (1874); Southampton &c. Corse, id. 230 (1867). See Nugent Bridge Co. v. Southampton Local v. Mississippi Levee Comrs., 58 Board of Health, 8 El. & Bl. 812

ber of a corporate body, upon which body a duty rests, cannot be held individually liable for the neglect of its duties that pertain to the corporate body. If there is neglect to exert its powers or all its means, it is the neglect of the corporate body and not of the individuals composing it.⁴⁵ Trustees of public works appointed by a municipal corporation, holding and managing the work solely for the benefit of the municipality, are not liable as a corporation or for the negligence of their employees.⁴⁶ So it has been held that trustees of corporations created for the purpose of extending charitable relief, either of private or public funds, having no capital stock and no provision for making dividends or profits, are not liable, as a corporation, for the negligence of their agents or servants in the line of their employment, resulting in personal injury or death to third persons.⁴⁷

§ 84. Physicians and surgeons — Dentists.—A physician or surgeon is not a warrantor or insurer of a cure, and is not to be tried by the result of his remedies.⁴⁸ The implied contract of

(1858); *Gibbs v. Liverpool Docks*, 3 Hurlst. & N. 164 (1858); *Clothier v. Webster*, 12 C. B. (N. S.) 790 (1862); *Gilbert v. Trinity House*, L. R., 17 Q. B. D. 795 (1886), overruling *Duncan v. Findlater*, 6 Cl. & Fin. 894 (1839).

⁴⁵ *Bassett v. Fish*, 75 N. Y. 303 (1878), reversing 12 Hun, 209.

⁴⁶ *Shearm. & Redf. on Neg.* (5th ed.), § 330; *Elliott on Roads & Streets*, chap. 25; *Walsh v. Brooklyn Bridge Trustees*, 96 N. Y. 427 (1884); *Walsh v. Mayor &c. of New York*, 107 id. 220 (1887); *Reid v. Mayor &c. of New York*, 139 id. 534 (1893).

⁴⁷ *Shearm. & Redf. on Neg.* (5th ed.), § 331. The person injured has no right to be indemnified by damages out of the trust fund. *Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507 (1846). Public hospital not liable to one of its patients. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876);

Benton v. Trustees of Boston City Hospital, 140 id. 13 (1885); *Downes v. Harper Hospital*, 101 Mich. 555 (1894); *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251 (1894); *Perry v. House of Refuge*, 63 Md. 20 (1884). Under *Laws of 1876*, chap. 176. *Haas v. Missionary Society*, 6 Misc. 281; 26 N. Y. Supp. 868 (1893). Charge of trial judge reported in full. *Boyd v. Insurance Patrol*, 113 Pa. St. 269 (1886); 120 id. 624 (1888). See *Newcomb v. Boston Protective Dept.*, 151 Mass. 215 (1890).

⁴⁸ *Shearm. & Redf. on Neg.* (5th ed.), § 605; *Thomas on Neg.*, p. 1107; *Hancke v. Hooper*, 7 Carr. & P. 81 (1835); *McCandless v. McWha*, 22 Pa. St. 261 (1853); 25 id. 95 (1855); *Ordranax on "Jurisprudence of Medicine,"* 42. For a leading case on this subject, see *Pike v. Honsinger*, 155 N. Y. 201 (1898).

a physician or surgeon is not to cure — to restore a fractured limb to its natural perfectness — but to treat the case with diligence and skill.⁴⁹ The physician, like the attorney, undertakes, in the practice of his profession, that he is possessed of that degree of knowledge and skill therein which usually pertains to the other members of his profession. And the physician, in attending his patients, engages that he will use due care to discover the nature of the disease, which gives occasion for his services, and in applying the usual remedies. But beyond this measure of skill and diligence, the law makes no exaction. If he is to be held for results, or as a guarantor of success, it can be only in virtue of his express agreement.⁵⁰ The degree of care and skill required is that reasonable degree of care and skill which physicians and surgeons ordinarily exercise in the treatment of their patients.⁵¹ The burden of proof to show want of proper care and skill is on the plaintiff, and he must affirmatively prove all the elements of the negligence charged.⁵² So the skill required of a dentist cannot be limited to such as is exercised by dentists in his neighborhood, but must be such as is ordinarily possessed and practiced by the average of his profession.⁵³

⁴⁹ Woodward, J., in *McCandless v. Whitesell v. Hill*, 101 Iowa, 629 *McWha*, 22 Pa. St. 261, 267 (1853); (1897); *Du Bois v. Decker*, 130 N. Y. 325 (1891); *Jones v. Vroom*, 8 Colo. App. 143 (1896); *Link v. Sheldon*, 136 N. Y. 1 (1892); *Gates v. Clairvoyant physicians. Nelson v. Harrington*, 72 Wis. 591 (1888).

⁵⁰ *Ely v. Wilbur*, 20 Vr. 685, 687 (1887); *Leighton v. Sargent*, 27 N. H. 460 (1853); 31 *id.* 119 (1855).

⁵¹ *State v. Housekeeper*, 70 Md. 162 (1888). The fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to exercise reasonable and ordinary care, skill and diligence. *Du Bois v. Decker*, 130 N. Y. 325 (1891).

⁵² *Holtzman v. Hoy*, 118 Ill. 534 (1886); *Carpenter v. Blake*, 60 Barb. 488 (1871); *State v. Housekeeper*, 70 Md. 162 (1888); *Hastings v. Stetson*, 91 Me. 229 (1898). See further on this general subject;

In North Carolina it was held that what is reasonable skill and due care in a physician in the treatment of a patient, is a question of law, and it is error to leave it to be determined by the jury. *Woodward v. Hancock*, 7 Jones' Law, 384 (1860). Malpractice question for the jury. *Moralzky v. Wirth*, 67 Minn. 46 (1896).

⁵³ *McCracken v. Smathers*, 122 N. C. 799 (1898).

§ 85. **Receivers.**— A receiver of a railroad company is liable for an injury to a passenger to the same extent as the company would have been if it was in possession and running the road.⁵⁴ He stands, in respect to duty and liability, just where the corporation would, were it operating the road.⁵⁵ The question whether or not the receiver is liable for negligence, must be tested by the same rules that would be applied if the corporation was the actual party defendant before the court.⁵⁶ A receiver is liable for personal injuries caused by negligence,⁵⁷ in the same manner and to the same extent as the corporation would be held, had not the receiver been appointed.⁵⁸ A receiver is personally liable to persons sustaining loss or injury by or through his own neglect or misconduct. He is personally responsible for misfeasance and a positive wrong.⁵⁹ He is not personally liable for acts of nonfeasance.⁶⁰ Nor is he

⁵⁴ *Sprague v. Smith*, 29 Vt. 421 (1880); *Graham v. Chapman*, 33 N. (1857); *Holman v. Galveston &c. Ry. Co.*, 14 Tex. Civ. App. 499 (1896); *McNulta v. Lockridge*, 137 Ill. 270 (1891).

⁵⁵ *Klein v. Jewett*, 11 C. E. Gr. 474 (1875). He represents or is the agent of the company. *Bartlett v. Keim*, 21 Vr. 260 (1888).

⁵⁶ *Klein v. Jewett*, 11 C. E. Gr. 475 (1875). In his official capacity. *Meara v. Holbrook*, 20 Ohio St. 137 (1870). Receivers of a railroad appointed in another State may be sued as common carriers in Massachusetts. *Paige v. Smith*, 99 Mass. 395 (1868). So an action at law in a State court lies against a receiver in possession of the property and effects of a railroad company appointed by the United States courts, for the torts of the servants of his predecessor in the same receivership. *McNulta v. Lockridge*, 137 Ill. 270 (1891). See *Little v. Dusenbury*, 17 Vr. 614 (1884); *Lyman v. Central Vt. R. R. Co.*, 59 Vt. 167 (1886); *Lamphear v. Buckingham*, 33 Conn. 238 (1866).

⁵⁷ *Durkin v. Sharp*, 88 N. Y. 225 (1882); *Fuller v. Jewett*, 80 id. 46

(1880); *Graham v. Chapman*, 33 N. Y. St. Rep. 349 (1890); *Winbourn's Case*, 30 Fed. Rep. 167 (1886); *Pope's Case*, id. 169 (1886); *Davenport v. Receivers of Alabama &c. R. R. Co.*, 2 Woods, 519 (1875); *Sloan v. Central Iowa R. R. Co.*, 62 Iowa, 728 (1883); *Meara v. Holbrook*, 20 Ohio St. 137 (1870); *McNulta v. Lockridge*, 137 Ill. 270 (1891). *Contra*, held that receivers in their official capacity are not subject to a suit, for a personal injury to one of their employes, resulting from the negligence of others of their employes in the same services. Receivers are not within the terms of the statute. *Henderson v. Walker*, 55 Ga. 481 (1875); *Thurman v. Cherokee R. R. Co.*, 56 id. 376 (1876); *Cardot v. Barney*, 63 N. Y. 281 (1875).

⁵⁸ See *Ray on Negligence of Imposed Duties*, § 163; *Graham v. Chapman*, 33 N. Y. St. Rep. 349 (1890).

⁵⁹ *Erwin v. Davenport*, 9 Helsk. 44 (1871).

⁶⁰ *Ib.*; *Bartlett v. Cicero &c. Co.*, 177 Ill. 68 (1898).

personally liable for the neglect or misconduct of those employed by him in the performance of the duties of his office.⁶¹ Damages are not to be recovered against him personally or execution issued against his individual property. The judgment should provide for payment out of the trust fund.⁶² The company itself is not liable for the negligence of the receiver or its servants;⁶³ provided it had no direction or control of the property.⁶⁴ Nor can an action of tort for personal injuries be sustained by an employe while a railroad was in the hands of receivers, against the new corporation, after the receivers have turned over the property to it.⁶⁵

§ 86. **Liability of the State.**—The State is not liable for the negligence or misfeasance of its agents, like a natural person or corporation, for the acts of their servants, except when the State, by its legislature, has voluntarily assumed such liability. This principle is said to be well settled upon grounds of public policy, and the doctrine uniformly asserted by writers of approved authority and the courts.⁶⁶

⁶¹ *Camp v. Barney*, 4 Hun, 373 (1875); *Candot v. Barney*, 63 N. Y. Co., 177 Ill. 68 (1898); *South Carolina &c. R. R. Co. v. Carolina &c. Ry. Co.*, 93 Fed. Rep. 543 (1899); *McNulta v. Lockbridge*, 137 Ill. 270 (1891).

⁶² *McNulta v. Lockbridge*, 137 Ill. 270 (1891). See *Ballou v. Farnum*, 9 Allen, 47 (1864); *Ray on Negligence of Imposed Duties*, § 164.

⁶³ *Ballou v. Farnum*, 9 Allen, 47 (1864); *Metz v. Buffalo &c. R. R. Co.*, 58 N. Y. 61 (1874); *Lock v. Franklin &c. Turnpike Co.*, 100 Tenn. 163 (1897); *Holman v. Galveston &c. Ry. Co.*, 14 Tex. Civ. App. 499 (1896); *McNulta v. Lockridge*, 137 Ill. 270 (1891).

⁶⁴ See *Parr v. Spartanburg &c. R. R. Co.*, 43 So. Car. 197 (1894). Cannot escape liability to the public for torts by leasing its road to another. *Ib.* Damages for torts of corporation receivership are part of the operating expenses. Claims for torts during the receivership follow

the fund. *Bartlett v. Cicero &c. Co.*, 177 Ill. 68 (1898); *South Carolina &c. R. R. Co. v. Carolina &c. Ry. Co.*, 93 Fed. Rep. 543 (1899); *McNulta v. Lockridge*, 137 Ill. 270 (1891).

⁶⁵ *Archambeau v. New York &c. R. R. Co.*, 170 Mass. 272 (1898). This defense is admissible under a general denial.

⁶⁶ *Story on Agency* (7th ed.), § 319; *Shearm. & Redf. on Neg.* (5th ed.), §§ 249, 251; *Lewis v. State of New York*, 96 N. Y. 71 (1884); *Thomas on Neg.*, p. 1131; *Loughlin v. State of New York*, 105 N. Y. 159 (1887); *Splitdorf v. State of New York*, 108 id. 205 (1888); *Donahue v. State of New York*, 112 id. 142 (1889); *Chapman v. State*, 104 Cal. 690 (1894); *Denning v. State*, 123 id. 316 (1899). By statute in New York the State permits damages to be recovered, sustained by them from the canals, or from their use and

§ 87. Liability for injuries on vessels—Act of Congress.—

The act of Congress, July 7, 1838, amended by act of August 30, 1852, for the better security of lives of passengers on board of vessels, propelled by steam, does not take away or impair the common-law right of action, by persons injured while passengers upon such vessels.⁶⁷

§ 88. Vendors and manufacturers of dangerous articles — **Druggists.**—There is a class of cases which hold that those who deal in and sell articles that are dangerous to life, such as drugs and explosives, are liable not only to the purchasers of such articles, but to all persons injured through whosoever hands they may have passed. As for example when a deadly poison is labelled a harmless medicine, and is sent upon the market.⁶⁸ So it was held that a caterer was liable for poisonous food, furnished at a ball to one who bought a supper ticket therefor.⁶⁹ The mere sale of a poisonous drug to one

management, or resulting or arising from the negligence or conduct of any officer of the State having charge thereof, or resulting or arising from any accident or matter or thing connected with the canals. Laws of 1870, chap. 321; Laws of 1883, chap. 205; Laws of 1884, chap. 60; *Rexford v. State of New York*, 105 N. Y. 229 (1887); *Locke v. State of New York*, 140 id. 480 (1894); *Sipple v. State of New York*, 99 id. 284 (1885).

⁶⁷ 10 U. S. Stat. at Large, 61; 16 id. 440; *Swarthout v. New Jersey Steamboat Co.*, 48 N. Y. 209 (1872). See *Carroll v. Staten Island R. R. Co.*, 58 id. 126, 141 (1874); *Caldwell v. New Jersey Steamboat Co.*, 47 id. 282 (1872); *Shearm. & Redf. on Neg.* (5th ed.), § 515.

⁶⁸ The liability arises, not out of any contract or direct privity between him and the person injured, but out of the duty the law imposes upon him to avoid acts in

their nature dangerous to the lives of others. *Thomas v. Winchester*, 6 N. Y. 397 (1852). See *Howes v. Rose*, 13 Ind. App. 674 (1895); *Wohlfahrt v. Beckert*, 92 N. Y. 490 (1883); 27 Hun, 74. So by Minn. Stat., § 14, chap. 147, Laws of 1885; *Osborne v. McMasters*, 40 Minn. 103 (1889); *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870); *Elkins v. McKean*, 79 Pa. St. 493 (1875); *Wise v. Morgan*, 101 Tenn. 273 (1898); *Walton v. Booth*, 34 La. Ann. 913 (1882); *Smith v. Hays*, 23 Ill. App. 244 (1886).

⁶⁹ *Bishop v. Weber*, 139 Mass. 411 (1885). The Georgia statute (Code, 1882, §§ 3003, 3004) provides if a person who knowingly or carelessly sells to another unwholesome provisions of any kind or adulterated drugs or liquors, the defect being unknown to the purchaser, and damage results, such person shall be liable in damages for such injury.

who asks for a harmless one, is insufficient to show negligence of the druggist in making the sale.⁷⁰ So where machinery or implements have concealed defects and are put upon the market without disclosing such defects, it has been held that the vendor is liable to the purchaser for injury therefrom, but not to a third person, unless the defect was so highly dangerous to any one exposed to the same as to make it negligent to market it at all.⁷¹ The general rule is stated thus: In the absence of fraud or deceit in effecting a sale, the maker and seller of an article, not intrinsically dangerous in character, is not liable to one not a party to the contract of sale, who is injured because of defects in the material or construction of the article, arising from negligence of the maker.⁷²

⁷⁰ *Howes v. Rose*, 13 Ind. App. 674 (1895). See *Brunswick v. White*, 70 Tex. 504 (1888); *Meyer v. King*, 72 Miss. 1 (1894). The Georgia statute (Code, 1882, § 3005), provides that "if a vendor of drugs and medicines, by himself or agent, either knowingly or negligently furnishes the wrong article or medicine, and damage accrues from the use of the drug or medicine furnished, to the purchaser or his patients or his family or his property, the vendor shall respond in damages for the injury done." Liability of Druggists, see 10 Am. & Eng. Ency. of Law (2d ed.), p. 266.

⁷¹ Whart. on Neg., § 134; Thomas on Neg. 730; Shearm. & Redf. on Neg. (5th ed.), §§ 683, 689, 690, 691. Cases in which this principle has been applied: *Balance wheel*. *Loop v. Litchfield*, 42 N. Y. 351 (1870). *Steam boiler*. *Losee v. Clute*, 51 N. Y. 494 (1873). *Steam apparatus*.

Reiss v. New York Steam Co., 128 N. Y. 103 (1891). *Sale of cartridges to young boy*. *Binford v. Johnston*, 82 Ind. 426 (1882). *Sale of revolver to young boy*. *Poland v. Earhart*, 70 Iowa, 285 (1886). *Gunpowder sold to a child*. *Carter v. Towne*, 103 Mass. 507 (1870). *Vicious horse*. *Carter v. Harden*, 78 Me. 528 (1886). *Selling loaded cartridges*. *Smith v. Clarke Hardware Co.*, 100 Ga. 163 (1896). *Woolen manufacturers dyeing clothes with common dyes are not liable to a purchaser poisoned by handling the clothes*. *Gould v. Slater Woolen Co.*, 147 Mass. 315 (1888). *Calomel given for quinine by physician of a steamship company; company not liable*. *Allan v. State SS. Co.*, 132 N. Y. 91 (1892).

⁷² *Bragdon v. Perkins-Campbell Co.*, 87 Fed. Rep. 109 (1898). *Case of the sale of a side-saddle*. *Ib.* See S. P., *Collis v. Selden*, L. R., 3 C. P. 495 (1868); *Winterbottom v. Wright*, 10 M. & W. 109 (1842).

PART II—PROCEDURE. EVIDENCE. DAMAGES. QUESTIONS OF LAW AND FACT.

CHAPTER III.

ACTIONS FOR PERSONAL INJURIES.

ACTIONS FOR CAUSING DEATH.

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| <p>§ 89. Style of action — Trespass — Case — Civil Action — Pleading.</p> <p>90. Election to sue in contract or tort — Parties — Damages.</p> <p>91. When the action will lie at common law.</p> <p>92. When the action will lie by statute — Municipal ordinance.</p> <p>93. Two actions from same wrongful act — Husband — Parent — Master.</p> <p>94. Right of action over against wrongdoer — Practice.</p> <p>95. Where the action may be brought — <i>Lex fori</i> — Federal courts.</p> <p>96. Death of parties — Abatement of right of action.</p> <p>97. Right of action — Assignment.</p> <p>98. No action at common law for causing death of a human being.</p> | <p>99. Action at common law for incidental loss resulting from death.</p> <p>100. Lord Campbell's Act — American statutes.</p> <p>101. Special statutory provisions.</p> <p>102. Distinguishing features of the action.</p> <p>103. The statute creates a new right of action.</p> <p>104. Liberal or strict construction</p> <p>105. The constitutions and the statutes.</p> <p>106. Where the action may be brought — Federal courts — Courts in admiralty.</p> <p>107. Death and action in different States — <i>Lex fori</i>.</p> <p>108. Death and action in different States — <i>Lex fori</i> — Continued.</p> <p>109. Survival of beneficiaries necessary.</p> <p>110. Distribution.</p> <p>111. There can be but one action and one recovery</p> |
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§ 89. Style of action — Trespass — Case — Civil action — Pleading.— At common law, the action for an injury to the person, when such injury was consequential, was trespass on the case, frequently designated an action on the case, or simply "case;" if the injury was committed by the immediate act complained of, the action was trespass *vi et armis*, simply called "trespass." There are many cases in the reports illustrating

the distinction between these two actions in their application as remedies to recover damages for personal injuries.¹ Many of the States have adopted a Civil Code of Procedure, in which the remedy is designated simply a "civil action."² In some of the States the common-law style of action is still in use, such as an action on the case.³ In some of the States an action of trespass, or trespass on the case, may be used,⁴ or an action

¹ Chitty on Pleading (vol. 1), pp. 122, 133, 162. "The words *trespass* and *case*, both in their ordinary and legal sense, have a different meaning; the word *trespass* applying to injuries resulting from direct force, and *case* to such as are consequential. True, the word *trespass*, in its broadest signification, as embracing every species of injury, would include *case*." Harrington v. Heath, 15 Ohio, 485 (1846). "The distinction between the actions of *trespass vi et armis* and on the case is perfectly clear. If the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action upon the case is the proper remedy." Day v. Edwards, 5 T. R. 648 (1794). If a man throws a log into the highway, and in that act it hits me, I may maintain *trespass*, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action upon the case; because it is only prejudicial in consequence, for which I could have no action at all. Reynolds v. Clarke, 1 Str. 634 (1726).

² Arkansas: Dig. of Stats. 1894, § 5605.

California: Deering's Ann. C. & S. (vol. 3), 1885, § 24307.

Indiana: Stats. 1896, § 249.

Iowa: Code 1888, § 3710.

Kansas: Gen. Stats. 1889, § 4087.

Minnesota: Stats. of Minn. 1894, § 5131.

Nebraska: Comp. Stats. 1895, § 5592.

New York: Stover's New York Ann. Code of Civil Procedure, § 418.

North Carolina: McCracken v. Smathers, 122 N. C. 799 (1898).

North Dakota: Rev. Code 1895, § 5181.

Ohio: Bates Ann. Stats. 1897, § 4971.

South Carolina: Code of Civil Procedure, § 1.

Utah: Comp. Laws 1888, § 3126.

Wyoming: Rev. Stats. 1887, § 2360.

³ Alabama: Counts in trespass and case may be joined when they relate to the same subject-matter. Code of Ala. (vol. 1), § 2673.

Michigan: 2 Howell's Stats., § 7759, p. 1942.

New Hampshire: Huntress v. Boston &c. R. R. Co., 66 N. H. 185 (1889).

New Mexico: Lutz v. Atlantic &c. R. R. Co., 6 N. Mex. 496 (1892).

Rhode Island: Whipple v. New York &c. R. R. Co., 19 R. I. 587 (1896).

Vermont: Manley v. Delaware &c. Co., 69 Vt. 101 (1896).

⁴ Delaware: Laws of 1874, chap. 106, § 11, p. 648.

Illinois: Rev. Stats. 1891, chap. 110, § 22, p. 1045; Chicago &c. R.

R. Co. v. Murowski, 78 Ill. App. 661 (1898).

of "tort,"⁵ or an "action on the facts of the case."⁶ In those States where the common-law form of action is still in use, the forms and style of the common-law pleadings are usually preserved, such as the declaration, plea. But in the Code States the pleadings are usually styled the complaint and answer. In Texas and Missouri the pleadings are styled a petition and answer.⁷

§ 90. Election to sue in contract or tort — Parties — Damages.— In a previous section it was stated that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*.⁸ In such cases the tort is dependent upon, while at the same time it is independent of the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract.⁹ Thus, when a passenger has been injured by the negligence of a common carrier, it is at the election of the plaintiff to declare in *assumpsit* and rely on the promise, or to declare in tort and rest on the breach of duty.¹⁰ The

Maine: Rev. Stats. 1884, chap. 82, § 15, p. 696.

Pennsylvania: "Action of trespass." *Purd. Dig. Supp.*, p. 2369 (act of May 25, 1887), § 2; *P. L.* 271.

Virginia: Code 1887, § 2901, p. 693.

West Virginia: Code 1891, chap. 103, § 8, p. 726.

⁵ Massachusetts: *Pub. Stats.* 1882, chap. 167, § 1, p. 964.

New Jersey: Rule 95 of Supreme Court promulgated June 21, 1888. Counts for causes of actions arising *ex delicto* may be joined in the same suit.

⁶ Tennessee: Code 1884, § 3441.

⁷ Texas: Rev. Stats. 1887, § 1187.

Missouri: Rev. Stats. 1889, §§ 2039, 2041.

⁸ *Rich v. New York &c. R. R. Co.*, 87 N. Y. 382, 390 (1882); *Cooley on Torts*, 90.

⁹ *Rich v. New York &c. R. R.*

Co., 87 N. Y. 382, 390 (1882); *Baltimore &c. R. R. Co. v. Carr*, 71 Md. 135 (1889); 1 *Addison on Torts*, 13. In such cases it is sometimes said that personal injuries are caused by a tortious breach of contract. *Johnson v. Northern Pacific Ry. Co.*, 46 Fed. Rep. 347 (1891). A culpable attorney or physician may be sued either for the breach of the implied contract, which obliges him to the exercise of skill and care, or in tort for a breach of duty with respect to the same particulars. *Tichenor v. Hayes*, 12 Vr. 193, 200 (1879).

¹⁰ *McElroy v. Nashua &c. R. R. Co.*, 4 Cush. 400, 403 (1849); *Jacksonville Street Ry. Co. v. Chappell*, 22 Fla. 616, 620 (1886); *Frink v. Potter*, 17 Ill. 406, 411 (1855); *Pennsylvania R. R. Co. v. Peoples*, 31 Ohio St. 537 (1877). See *Stock v. City of Boston*, 149 Mass. 410 (1889); *Taylor v. Manchester &c.*

recovery will be governed by the rules peculiar to the form of action.¹¹ If the action is in tort, all the parties liable need not be joined as defendants;¹² but if the action is in contract, all the parties to the contract must be joined, and no one who is not a party to the contract can maintain a suit or be joined in the action.¹³ So the rule for the assessment of damages is different in the two actions. The rule in actions for breach of contract is, that the damages recoverable are only such as the parties may reasonably be supposed to have contemplated as likely to result from such a breach. The general rule in actions for torts is, that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him.¹⁴ Hence the rule of damages in actions brought for a breach of contract is more restricted than in actions of tort.¹⁵

§ 91. **When the action will lie at common law.**—In order to maintain an action for an injury to a person at common law, it must be shown that the defendant was under some legal duty to exercise care towards the plaintiff, which he has omitted to perform.¹⁶ This is the basis on which the cause of action rests.¹⁷ The duty may exist as to some persons, and not as to others,

Ry. Co., L. R., 1 Q. B. D. 134 (1895); *Boston v. Chesapeake &c. Ry. Co.*, 36 W. Va. 318 (1892); *Johnson v. Northern Pacific Ry. Co.*, 46 Fed. Rep. 347 (1891); *Walker v. Great Northern Ry. Co.*, 28 Ir. L. R., Q. B. D. 69 (1890); *Shearm. & Redf. on Neg.* (5th ed.), § 22; *Hutchinson on Carriers*, §§ 738–740. the duty to carry safely being a contract between the company and the servant. *Alton v. Midland Ry. Co.*, 19 C. B. (N. S.) 213 (1865). See *Bricker v. Philadelphia &c. R. R. Co.*, 132 Pa. St. 1 (1890); *Fairmount &c. R. R. Co. v. Stutler*, 54 id. 375 (1867).
¹⁴ *Brown v. Chicago &c. Ry. Co.*, 54 Wis. 342 (1882).

¹¹ *Frink v. Potter*, 17 Ill. 411 (1855).

¹² § 131.

¹³ § 112. Thus an action will not lie against a railway company, as carriers of passengers for hire, at the suit of the master, for a personal injury sustained through its negligence by its servant, whereby the master lost the benefit of the services of the servant—the contract out of which arose

¹⁵ *Ehrgott v. Mayor &c. of New York*, 96 N. Y. 264, 281 (1884).

¹⁶ *Evansville &c. R. R. Co. v. Griffin*, 100 Ind. 221 (1884); *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 394 (1886); *Heaven v. Pender*, L. R., 11 Q. B. D. 503 (1883); *Lechman v. Hooper*, 23 Vr. 253 (1890); *Ennis v. Gray*, 87 Hun, 355 (1895).

¹⁷ *Sweeny v. Old Colony &c. R. R. Co.*, 10 Allen, 368, 372 (1865).

depending upon the peculiar relations and circumstances.¹⁸ Thus, as between master and servant, or passenger and carrier, the duty arises out of the relation existing between them. Where no legal duty exists there is no cause of action.¹⁹ The defendant must be guilty of some wrongful act or breach of positive duty to the plaintiff.²⁰ The duty is dictated and measured by the exigencies of the occasion.²¹ Injury alone will

¹⁸ *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 394 (1886). Thus overcrowding the platform of a station of an elevated railroad causing injury to one there for the purpose of taking the train is actionable. *McGearty v. Manhattan Ry. Co.*, 15 App. Div. 2 (1897); 43 N. Y. Supp. 1086.

¹⁹ *Reynolds v. Van Beuren*, 155 N. Y. 120 (1898). "It is not necessary, in order to establish the legal duty, to do more than prove the facts out of which the duty springs, for where the facts are established the law will fix the duty. The duty is created by the law but the facts must exist in order to give force or relevancy to the legal principles." *Elliott on Roads & Streets*, 637.

²⁰ *Peake v. Buell*, 90 Wis. 508, 515 (1895).

²¹ *Baltimore &c. R. R. Co. v. Jones*, 95 U. S. 442 (1877). Actions for negligence may, for convenience, be separated into four classes, namely,—where, upon the occasion of the injury complained of, (1) the plaintiff, (2) the defendant, (3) neither of the parties was present, and (4) where both parties were present. In all of them it may happen that both parties were more or less negligent. Actions upon the statute of highways are a common example of the first class. The negligence of the defendant, however great, does not

relieve the plaintiff from the duty of exercising ordinary care. * * * The law is not affected by the presence or the absence of the parties, nor by the difficulty of applying it to complicated facts. To warrant a recovery where both parties are present at the time of the injury, as well as in other cases, ability on the part of the defendant must concur with non-ability on the part of the plaintiff to prevent it by ordinary care. Their duty to exercise this degree of care is equal and reciprocal; neither is exonerated from the obligation by the present or previous misconduct of the other. The law no more holds one responsible for an unavoidable, or justifies an avoidable, injury to the person of one who carelessly exposes himself to danger, than to his property, similarly situated in his absence. He who cannot prevent an injury negligently inflicted upon his person or property by an intelligent agent "present and acting at the time" is legally without fault, and it is immaterial whether his inability results from his absence, previous negligence, or other cause. On the other hand, his neglect to prevent it, if he can, is the sole or co-operating cause of the injury. *Carpenter, J., in Nashua &c. Steel Co. v. Worcester &c. R. Co.*, 62 N. H. 159 (1882).

never support an action on the case; there must be a concurrence of injury and wrong. If a man does an act that is not unlawful in itself, he cannot be held responsible for any resulting injury, unless he does it at a time or in a manner or under circumstances which render him chargeable with a want of proper regard for the rights of others. In such a case, the negligence imputable to him constitutes the wrong, and he is accountable to persons injured, not because damage has resulted from his doing the act, but because its being done negligently or without due care has resulted in injury. If the act was not wrongful in itself, the wrong must necessarily be sought for in the time or manner or circumstances under which it was performed. Injury does not prove the wrong, but only makes out the case for redress after the wrong is established.²² So in every valid cause of action two elements must be present — the injury and the damage. The one is the legal wrong which is to be redressed, the other the scale or measure of the recovery. As there may be damages without an injury, so there may be an injury without damages.²³ Nominal damages are sufficient to maintain the action.²⁴ Fresh damages without a fresh injury will not authorize a second or subsequent action.²⁵ The injured person can recover but one compensation for all damages past and prospective.²⁶ So he can maintain but one action for an injury to his person and property.²⁷ On this point, however,

²² Cooley, C. J., in *Macomber v. Nichols*, 34 Mich. 212, 216 (1876). "To constitute a tort two things must concur — a wrongful act committed by the defendant and proximate legal damage to the plaintiff." Taft, J., in *Trow v. Thomas*, 70 Vt. 584 (1898). A person cannot be made to pay damages for his acts unless they are done in such manner and at such a time as to show that he was acting in disregard of the rights of others. *Thompson v. Dodge*, 58 Minn. 555 (1874).

²³ Elliott, J., in *City of North Vernon v. Voegler*, 103 Ind. 314, 319 (1885). "Actionable negligence arises essentially from (1) a

legal duty; (2) a breach of duty by failure to observe care; and (3) such breach proximately causing damage." Little, J., in *Perry v. Macon Consolidated Street R. R. Co.*, 101 Ga. 400, 407 (1897).

²⁴ *Baker v. Manhattan R. R. Co.*, 118 N. Y. 533 (1890); *Leeds v. Metropolitan Gas Light Co.*, 90 id. 26 (1882).

²⁵ *City of North Vernon v. Voegler*, 103 Ind. 314, 319 (1885).

²⁶ *Wallace v. Wilmington &c. R. R. Co.*, 8 Houst. 529 (1889, Del.); *Ayres v. Delaware &c. R. R. Co.*, 158 N. Y. 254 (1899).

²⁷ *Reilly v. Sicilian Asphalt Paving Co.*, 4 Am. Neg. Rep. 692; N. Y. App. Div. (1898). A personal in-

there is a contrariety of judicial opinion.²⁸ An injury to the plaintiff and his clothing furnishes but one cause of action.²⁹

§ 92. **When the action will lie by statute — Municipal ordinance.**—Private actions do not lie for breach of public duties,³⁰ unless such actions are given by statute. A breach of a general duty to the public is not sufficient to maintain a private action; it must be a breach of a special duty to the individual injured.³¹ The principle of law is, that where a corporate body, whether of a municipal or of a private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty, whenever such breach or neglect has occasioned an injury to that individual. But if such corporation owes a duty to the *public*, and neglects to perform it, although every individual comprising that public is thereby injured, some more and some less, yet they can have no private remedy at the common law.³² When the statute makes the omission of a certain act illegal, and subjects the parties omitting it to penalties, one receiving

jury and damage to plaintiff's carriage at the same time and from the same cause give rise to but one cause of action, and a recovery in an action for damages to one will bar a subsequent action for damages to the other. *Ib.* See *Whitney v. Town of Clarendon*, 18 Vt. 252 (1846).

²⁸ *Brunsdon v. Humphrey*, L. R., 14 Q. B. D. 141 (1884), reversing 11 *id.* 712. See *Peake v. Baltimore & C. R. R. Co.*, 26 Fed. Rep. 495 (1886).

²⁹ *Bliss v. New York & C. R. R. Co.*, 160 Mass. 447, 455 (1894). When there was a collision with defendant's train by which the intestate was killed and his horses and wagon were destroyed, it was held, that a suit by the administrator under the Revised Statutes of Ohio, sections 6134, 6135, to recover damages for the death of the intestate is not barred by the

former recovery of the value of the horses and wagon, in another suit by the administrator. *Peake v. Baltimore & C. R. R. Co.*, 26 Fed. Rep. 495 (1886).

The injury must be the proximate result of the defendant's fault, and the damage must be special to plaintiff. It need not, however, be a direct injury to the plaintiff or resulting immediately from the defendant's negligence, as in the cases of masters, parents or husbands suing, not for the direct personal injury, but for the indirect damage growing out of the personal injury. *Shearm. & Redf. on Neg.* (5th ed.), § 115.

³⁰ *Taylor v. Lake Shore & C. R. R. Co.*, 45 Mich. 74 (1881).

³¹ *Ennis v. Gray*, 87 Hun, 355 (1895).

³² *Hornblower, C. J.*, in *Freeholders of Sussex City v. Strader*, 3 Harr. 108, 121 (1840, N. J.)

bodily injury through such omission has the right of suing at common law. The action, however, must be subject to the rules of the common law.³³ The legislature has power to attach a condition to the maintenance of a common-law action as well as one created by statute.³⁴ A plaintiff who sues on a right of action given by statute must present a case clearly within the statute which creates the right.³⁵ Where a statute, which creates a new right, prescribes the remedy for its violation, the remedy is exclusive. But when a new remedy is given by statute for a right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option.³⁶ In this respect there is no difference in principle between an obligation imposed by statute and one imposed by ordinance in pursuance of statutory authority.³⁷ An ordinance of a city is not of itself sufficient to give a cause

³³ *Caswell v. Worth*, 5 El. & Bl. 849, 855 (1856). One of those rules is that a want of ordinary care, or willful misconduct on the part of the plaintiff is an answer to the action *Ib.* "As a general rule, when an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty." *Devens, J., in Parker v. Barnard*, 135 Mass. 120 (1883).

³⁴ *Reining v. City of Buffalo*, 102 N. Y. 308 (1886).

³⁵ *Hamilton v. Jones*, 125 Ind. 176, 178 (1890). In some of the States there are statutes giving a right of action to persons suffering injuries, resulting from the intoxication of any person, against those who furnished the liquor, causing such intoxication. 6 *Am. & Eng. Ency. of Law* (2d ed.), p. 36. These statutes are frequently

styled *The Civil Damage Acts*. The action in such cases is entirely the creature of the statute. Sale or gift of intoxicating liquors not actionable at common law. *Cruse v. Aden*, 127 Ill. 231 (1889).

³⁶ *City of Zanesville v. Fannan*, 53 Ohio St. 605 (1895). So where a statute prescribes a duty, the duty so imposed is both created and measured by the statute. *Pauley v. Steam Gauge &c. Co.*, 131 N. Y. 90, 96 (1892). "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to said law." *Comyn's Digest*, "Action upon Statute" (F); *Willy v. Mulledy*, 78 N. Y. 310 (1879).

³⁷ *City of Rochester v. Campbell*, 123 N. Y. 405 (1890); *Flynn v. Canton Co. of Baltimore*, 40 Md. 312 (1874); *City of Hartford v. Talcott*, 48 Conn. 525 (1881).

of action to a party injured by an act in violation of its terms.³⁸ A municipal ordinance cannot create a civil liability against a person violating it and in favor of persons injured by its violation, for this is a power which belongs alone to the sovereign power of the State. The only liability which attaches to the infraction of such an ordinance is the penalty it imposes.³⁹

§ 93. Two actions from same wrongful act — Husband — Parent — Master.— At common law, two causes of action may spring from the same wrongful act, because two distinct injuries may thereby be inflicted⁴⁰ to two separate parties — the one receiving the direct personal injury, the other, an indirect loss caused by the same negligent act. Thus, for a tort committed upon a wife, two actions will lie, as a general rule — one by the husband alone for the loss of service and expenses, and the other by the husband and wife for the injury to the wife.⁴¹ So a parent and child have each a separate right of action growing out of the injury inflicted upon the infant.⁴² The right of a parent to sue for injuries to his child is the same in principle as that of a master to sue for injuries to his servant. So the master and servant may each have a separate or distinct cause of action — the servant to recover for his injuries, and the master to recover damages to himself for the loss of the labor and services of his servant *per quod servitium amisit*.⁴³

³⁸ *Knuppfe v. Knickerbocker Ice Co.*, 84 N. Y. 488 (1881). Or a city police regulation. *Moore v. Gadsden*, 93 N. Y. 12 (1883).

³⁹ *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 650 (1896); *Rockford City Ry. Co. v. Blake*, 173 Ill. 354 (1898).

⁴⁰ *Hendrick v. Ilwaco Ry. & Co.*, 4 Wash. St. 400 (1892); *Mayhew v. Burns*, 103 Ind. 328 (1885); *Putnam v. Southern Pacific Co.*, 21 Or. 230 (1891).

⁴¹ *Rogers v. Smith*, 17 Ind. 323 (1861); *Rockwell v. Waverly & C. Traction Co.*, 187 Pa. St. 568 (1898); *Hawkins v. First Street Cable Ry. Co.*, 3 Wash. St. 592 (1892); *Consolidated Tract. Co. v. Whelan*, 31

Vr. 154 (1897); *McKune v. Santa Clara & C. Co.*, 110 Cal. 480 (1895); *Meese v. Fond du Lac*, 48 Wis. 323 (1879); *Town of Newbury v. Connecticut & C. R. R. Co.*, 25 Vt. 377 (1853).

⁴² *Oakland Ry. Co. v. Fielding*, 48 Pa. St. 320 (1864); *Karr v. Parks*, 44 Cal. 46 (1872); *Cowden v. Wright*, 24 Wend. 429 (1840); *Sibley v. Ratliffe*, 50 Ark. 477 (1888); *Covington Street Ry. Co. v. Packer*, 9 Bush, 455 (1872); *Cincinnati & C. R. R. Co. v. Chester*, 57 Ind. 297 (1877).

⁴³ *Ames v. Union Ry. Co.*, 117 Mass. 541, 543 (1875); *Fairmount & C. Ry. Co. v. Stuller*, 54 Pa. St. 375 (1867).

§ 94. Right of action over against wrongdoer — Practice.—

When a party has been exposed to liability and suffers damages thereby and is sued and has been compelled to pay money on account of the negligence of another party, and they are not joint tort-feasors or *particeps criminis*, an action will lie by the former against the latter to recover the amount so paid. This is so whether contractual relations exist between them or not.⁴⁴ Mr. Justice Endicott, of the Supreme Court of Massachusetts, stated the rule thus: "When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable or *particeps criminis*, and the damage results from their joint offense. The rule does not apply when one does the act or creates the nuisance and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act had thus exposed him." In such case the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable.⁴⁵ The illustration of this principle is most frequently found in that class of cases where a municipality which has been compelled to pay a judgment recovered against it for personal injuries caused by a defect in a sidewalk, may recover the amount of the judgment from the property-owner whose negligence to repair was the occasion of the injury.⁴⁶ Or where the municipi-

⁴⁴ *Oceanic Steam Nav. Co. v. Campania Trans. Espanola*, 134 N. Y. 461 (1892); 144 id. 663 (1895).

⁴⁵ *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 154 (1873). In that case the defendant fastened a telegraph wire to the plaintiff's chimney without having obtained permission; the wire pulled the chimney into the street, injuring a traveller, who brought suit against the owner of the building; it was held, that an action would lie by the plaintiff for the amount of money so paid to the traveller as damages against the defendant. Same principle, see *Churchill v. Holt*, 127 Mass. 165 (1879); 131 id.

67; *Old Colony R. R. Co. v. Slavons*, 148 id. 363 (1889); *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475 (1872); *City of Rochester v. Montgomery*, 72 id. 65 (1878); *Nashua Iron & Co. v. Worcester & C. R. R. Co.*, 62 N. H. 159 (1882); *Veazie v. Penobscot R. R. Co.*, 49 Me. 119 (1860); *Hamden v. New Haven & C. R. R. Co.*, 27 Conn. 158 (1858).

⁴⁶ *Brockville Borough v. Arthurs*, 152 Pa. St. 334 (1893); 130 id. 501. In such case the person injured may proceed in the first place either against the municipality or the property-owner.

pal corporation itself, not being the wrongdoer, has been compelled to pay damages, caused by the obstruction of streets, by the negligence of its contractors or third persons.⁴⁷ Or where a master has had to pay damages caused by the servant's negligence, the master, not having contributed to the injury, may recover the sum so paid from the servant.⁴⁸ Notice of the pendency of such action should be given to the original wrongdoer, with a request to him to come in and defend the action.⁴⁹ He will then be concluded by the judgment rendered;⁵⁰ but he may show that he was free from fault.⁵¹ The effect of not giving any notice is to impose upon the party first sued the burden of again litigating the case and establishing the actionable facts.⁵² The notice does not go to the right of action.⁵³

§ 95. Where the action may be brought — Lex fori — Federal courts.— At common law, a right of action is given for personal injuries. Personal actions, such as actions *ex delicto* for personal injuries, are transitory. They may be brought in any

⁴⁷ *City of Rochester v. Montgomery*, 72 N. Y. 65 (1878); *Village of Port Jervis v. First Nat. Bank*, 96 id. 550 (1884); *Lowell v. Boston &c. R. R. Co.*, 23 Pick. 24 (1839); *City of Elkhart v. Wickwire*, 87 Ind. 77 (1882); *Robbins v. Chicago City*, 4 Wall. 657 (1866); 2 Black, 418 (1862); *Washington Gas Light Co. v. Dist. of Columbia*, 161 U. S. 316 (1895).

⁴⁸ *Grand Trunk Ry. Co. v. Latham*, 63 Me. 177 (1874); *Smith v. Foran*, 43 Conn. 244 (1875); *Mobile &c. Ry. Co. v. Clanton*, 59 Ala. 392 (1877); *Willard v. Pinard*, 44 Vt. 34 (1871). See *Whart. on Neg.*, § 246; 2 *Thomp. on Neg.* 1061; *Shearm. & Redf. on Neg.* (5th ed.), § 24a.

⁴⁹ *Elliott on Roads & Streets*, 656.

⁵⁰ *Ib.* The verdict and judgment are conclusive evidence. *City of Boston v. Worthington*, 10 Gray, 496 (1858); *City of Portland v.*

Richardson, 54 Me. 46 (1866). The record of the judgment is competent evidence. *Mayor &c. Troy v. Troy &c. R. R. Co.*, 49 N. Y. 657 (1872); *City of Rochester v. Montgomery*, 72 id. 65 (1878); *Schaefer v. City of Fond du Lac*, 99 Wis. 333 (1898).

⁵¹ *City of Chicago v. Robbins*, 2 Black, 418 (1862); 4 Wall. 657 (1866).

⁵² *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550 (1884); *Westfield v. Mayo*, 122 Mass. 100 (1877). In the absence of any statutory provision upon the subject, formal notice in writing is not necessary. *Robbins v. Chicago City*, 4 Wall. 657 (1866); 2 Black, 418 (1862); *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550 (1884).

⁵³ *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550 (1884).

jurisdiction where the wrongdoer can be found.⁵⁴ The law of the State in which the suit is brought controls the remedy, *i. e.*, the remedy is governed by the *lex fori*,⁵⁵ for such injuries as might be redressed by action at common law will be redressed by action in the State where brought, without proof of what the law of the State where the injury occurred is, it being presumed that the common law exists in the foreign State or country, unless the contrary is shown.⁵⁶ Actions for personal injuries may be brought in the Federal courts, when the citizenship of the parties is such as to confer jurisdiction. But when the points involved in the suit are those of general law, which are to be determined by a reference to all the authorities, and a consideration of the principles underlying the liability of the defendant, the courts of the United States are not bound by the decisions of the highest court of the State in which the cause of action arose.⁵⁷ In many of the States the common-law liability has been modified or changed by statute, such as a master's liability to his servants for injuries growing out of the negligence of fellow servants, especially in reference to servants employed by railroad corporations.⁵⁸ The Supreme Court of

⁵⁴ *Ackerson v. Erie Ry. Co.*, 2 Co., 77 id. 202 (1886); *Jackson v. Vr.* 309 (1865); *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116 (1891); *Wooden v. Western &c. R. Co.*, 126 N. Y. 10 (1891); *Mexican National Ry. Co. v. Jackson*, 89 Tex. 107 (1896); *Cincinnati &c. R. R. Co. v. McMullen*, 117 Ind. 439 (1889). Whether allowed by statute or common law. *McLeod v. Connecticut &c. R. R. Co.*, 58 Vt. 727 (1886).

⁵⁵ *Anderson v. Milwaukee &c. Ry. Co.*, 37 Wis. 321 (1875); *Krogg v. Atlanta &c. R. R. Co.*, 77 Ga. 202 (1886); *Herrick v. Minneapolis &c. Ry. Co.*, 31 Minn. 11 (1883). See *contra*, *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578 (1897).

⁵⁶ *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116 (1891); *Selma &c. R. R. Co. v. Lacy*, 43 Ga. 461 (1871); *Krogg v. Atlanta &c. R. R.*

⁵⁷ *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555 (1888); *Baltimore &c. R. R. Co. v. Baugh*, 149 id. 368 (1893); *Texas &c. Ry. Co. v. Cox*, 145 id. 593 (1892); *Howard v. Delaware &c. Co.*, 40 Fed. Rep. 195 (1889).

⁵⁸ Iowa Code, § 1307; Minnesota, chap. 13, Laws of 1887. The courts of those States have held that the servant must be engaged in the perilous business of railroad-ing; the peculiar dangers attending the business of operating a railroad. *Deppe v. Chicago &c. R. R. Co.*, 36 Iowa, 52, 56 (1872); *Lavalee v. St. Paul &c. Ry. Co.*, 40 Minn. 249 (1889).

Alabama: Stats. 1886, Code, §§ 2590-2592.

Wisconsin held that no action will lie in that State by a servant against his master for injuries received in the course of the service, through the negligence of a fellow servant, where such an injury was received in the State of Iowa, notwithstanding the fact that the Iowa statute gave a right of action.⁵⁹ The Supreme Court of Minnesota reached an opposite conclusion upon substantially the same state of facts. It said it is not necessary that the law of the State where the right of action accrued and the law of the forum where it is sought to be enforced should concur in holding that the act done gave a right of action. The statute referred to is not against the public policy of the laws of Minnesota, although differing from the common-law rule, which we retain.⁶⁰

California: Code, § 1970.

Florida: Chap. 4071, Laws of 1891.

Georgia: Code 1882, §§ 2202, 2083.

Kansas: 1 Gen. Stats. 1889, par. 1251. Is not restricted to servants while engaged in moving trains. *Atchison &c. R. R. Co. v. McKee*, 37 Kan. 592 (1887).

Massachusetts: Stats., chap. 207, Laws of 1887. Applies to all servants.

Mississippi: Code 1892, § 3559.

Montana: Comp. Stats. 1888, p. 817, § 697.

Texas: Laws of 1891, chap. 24.

Wisconsin: Chap. 220, Laws of 1893.

⁵⁹ *Anderson v. Milwaukee &c. Ry. Co.*, 37 Wis. 321 (1875). See also *Iowa Code*, § 1307; *Krogg v. Atlanta &c. R. R. Co.*, 77 Ga. 202 (1886); *Louisville &c. R. R. Co. v. Trammell*, 93 Ala. 350 (1890); *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578 (1897). In a suit by a servant for a personal injury which occurred in the Republic of Mexico the Supreme Court of Texas held that the courts of

Texas will not undertake to adjudicate rights which originated in another State or country under statutes materially different from the law of that State in relation to the same subject-matter. *Mexican National Ry. Co. v. Jackson*, 89 Tex. 107 (1896).

⁶⁰ *Herrick v. Minneapolis &c. Ry. Co.*, 30 Minn. 11 (1883). That case was followed and approved by the Supreme Court of the State of Illinois, which held that a suit could be maintained in that State for an injury done in the State of Indiana, where the statute of that State gave a right of action. *Chicago &c. R. R. Co. v. Rouse*, 178 Ill. 132 (1899), affirming 78 Ill. App. 286; 5 Am. Neg. Rep. 549; *Njus v. Chicago &c. Ry. Co.*, 47 Minn. 92 (1891). Action by servant against master for personal injuries, contract of service and service performed in the State of Pennsylvania for which no right of action could be maintained in the State of Pennsylvania. Held, the action could not be maintained in the State of Ohio though the laws of Ohio would give full relief had the

§ 96. Death of parties — Abatement of right of action.—

At common law, the right of action for a personal injury abated upon the death of the person to the action before judgment,⁶¹ which is expressed by the Latin phrase, *actio personalis moritur cum persona*. This principle is stated in Williams on Executors thus: "But it was a principle of the common law that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person *to* whom, or *by* whom, the wrong was done. Thus, where the action was founded on any malfeasance or misfeasance, was a tort, arose *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a water-course, obstructing lights, escape, and many other cases of the like kind. Where the *declaration* imputes a tort, either to the person or the property of another, and the *plea* under the old pleading must have been 'not guilty,' the rule was *actio personalis moritur cum persona*."⁶² In some of the States, statutes have been passed declaratory of the common-law rule. Thus the Florida statute provides that all actions for personal injuries shall die with the person.⁶³ There is a distinction between the abatement

transaction occurred in that State. No recovery can be had in the State of Ohio when barred by the laws of another State where the cause of action arose. *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623 (1891). See *Kahl v. Memphis &c. R. R. Co.*, 95 Ala. 337 (1891); *Alabama &c. R. R. Co. v. Carroll*, 97 id. 126 (1892); *Alabama &c. R. R. Co. v. Fulghum*, 87 Ga. 263 (1891).

⁶¹ *Baker v. Bolton*, 1 Campb. 493 (1808); *Soule v. New York &c. R. R. Co.*, 24 Conn. 575 (1856); *Green v. Thompson*, 26 Minn. 500 (1880). Abates on the death of the wrongdoer. *Hamilton v. Jones*, 125 Ind. 176 (1890); *Russell v. Sunbury*, 37 Ohio St. 372 (1881). See *Quin v. Moore*, 15 N. Y. 432 (1857).

⁶² Williams on Executors (vol. 2), p. 4, Randolph & Talcott Ed.

⁶³ Rev. Stats. of Fla. 1891, § 989. Indiana: Stats. 1896, § 282.

Minnesota: Stats. 1894. § 5912. An action for a purely personal tort does not survive the death of the tort-feasor. *Green v. Thompson*, 26 Minn. 500 (1880).

New York: An action given by the statute (chap. 450, Laws of 1847; Code of Civ. Pro., § 1902) to the representatives of the decedent, whose death was caused by the negligence of another, abates upon the death of the wrongdoer, and an action cannot be maintained against his representatives. *Hegrick v. Keddie*, 99 N. Y. 258 (1885). An action against a common carrier, by a husband, for loss of service and expense on account of injury to his wife while a passenger is grounded in tort; it does not abate at the death of the plaintiff; it is within Rev. Stats. 447, § 1. *Cregin v. Brooklyn Cross Town R. Co.*, 75 N. Y. 192 (1878); 9 Hun, 341.

of a suit, by the death of one or both of the parties to it, and the abatement of a cause of action by force of the maxim, *actio personalis moritur cum persona*.⁶⁴ The first is a matter of procedure only. In many of the States the common-law rule has been changed or modified by statute, which provides that the right of action for an injury to the person shall survive.⁶⁵ In some of the States it is provided that the right of action shall not abate after verdict.⁶⁶

⁶⁴ Broom's Legal Maxims, 905; State v. Baltimore &c. R. R. Co., Ray on Negligence of Imposed Duties, § 167. 70 Md. 319 (1889). Massachusetts: Pub. Stats., p.

⁶⁵ Arkansas: Dig. of Stats., § 5058, § 1. Mississippi: Code, §§ 1513, 2078, 2079; Vicksburg &c. R. R. Co. v. Phillips, 64 Miss. 693 (1887). Law Reg. (N. S.), p. 385. Montana: Cons. Codes & Stats.

Colorado: Ann. Stats., § 2917. 1895, p. 792, § 587. Connecticut: Gen. Stats. 1888, New Hampshire: Pub. Stats. §§ 1007-1009; Soule v. New York &c. R. R. Co., 24 Conn. 575 (1856); 1891, chap. 191, § 8. Murphy v. New York &c. R. R. Co., 29 id. 496 (1861); 30 id. 184 (1861). New Jersey: Gen. Stats of N. J.

Georgia: Code (vol. 2) 1895, § 3825. (vol. 2), p. 1426, §§ 4, 5; Tichenor v. Hayes, 12 Vr. 193 (1879). Ohio: Bates' Ann. Stats. 1897

Illinois: Act of 1872, § 123; Holton v. Daly, 106 Ill. 131 (1883); Oklahoma: Stats. 1893, par. 4312, § 434. Chicago &c. R. R. Co. v. O'Connor, 119 id. 586 (1887). Pennsylvania: Brightly's Pur-

Iowa: McClain's Ann. Code 1888, § 3730. don's Dig. (vol. 2) 1894, p. 1603, § 2. Rhode Island: Gen. Laws 1896, p. 806, § 7.

Kansas: Gen. Stats. 1889 (vol. 2), § 4516; Hulbert v. City of Topeka, 34 Fed. Rep. 510 (1888). Tennessee: Code 1896, § 4569; Mill. & V. Code, § 3130.

Kentucky: Ky. Stats. 1894, § 10. Texas: Rev. Stats. 1895, p. 649, § 3353a.

Louisiana: Art. 2315, as amended by Act No. 71, 1884, p. 94. Vermont: Laws of 1847, p. 29, No. 42; Gen. Stats. 1894, § 2447;

Maryland: Public Gen. Laws (vol. 2), p. 1115, § 25. An action by a husband to recover damages for the killing of his wife, abates on the death of the husband; section 1 of article 2 of the Code of 1860, which provides for the survival of personal actions, expressly excepting from its operation ac-

Virginia: Code 1887, § 2906. tion for injuries to the person.

⁶⁶ Nevada: Gen. Stats. 1885, § 3038.

North Carolina: Code (vol. 1) 1883, § 188, par. 2.

North Dakota: Rev. Codes, § 5234.

§ 97. **Right of action — Assignment.**— A general rule of the common law is, that a claim or demand or right of action to recover damages for a personal injury cannot be assigned or transferred; this is so by statute in New York.⁶⁷ In Iowa it has been held that a claim based upon a personal tort, which at common law died with the party, may be assigned or transferred like any other cause of action.⁶⁸ So it has been held by the Supreme Court of Iowa that where personal injury is inflicted in the State of Iowa, a cause of action arises thereon which is assignable under the laws of that State. If the assignment is made and delivered in a State where such assignment is void, still an action may be prosecuted thereon in the courts of Iowa.⁶⁹ But in Minnesota it was held that a right to recover damages for a personal tort is a mere personal right and not assignable even after verdict, and before judgment.⁷⁰

§ 98. **No action at common law, for causing death of a human being.**— At common law, no action could be maintained for the negligence or default of another, causing the death of a human being. Lord Ellenborough stated the common law to be that, "in a civil court, the death of a human being could not be complained of as an injury."⁷¹ The right of action for

Oregon: Hill's Ann. Laws 1892, p. 162, § 39.

New Mexico: Not pending action. Comp. Laws 1884, § 2139.

⁶⁷ Rev. Stats., Code & Laws New York (Birdseye 1889, vol. 1), p. 124, § 2. But it was held by the Court of Appeals that the interest of the mother in the damages which may be recovered in the suit, for causing the death of her minor child, is one capable of assignment. *Quin v. Moore*, 15 N. Y. 432 (1857). See § 128.

⁶⁸ *Gray v. McCallister*, 50 Iowa, 497 (1879).

⁶⁹ *Vimont v. Chicago &c. Ry. Co.*, 69 Iowa, 296 (1886).

⁷⁰ *Hunt v. Conrad*, 47 Minn. 557 (1891). In Wisconsin it was held that a cause of action for a

personal injury for negligence was assignable before judgment. *Lehmann v. Farwell*, 95 Wis. 185. See 14 L. R. A. 512, n.

⁷¹ *Baker v. Bolton*, 1 Campb. 493 (1808); *Tiffany on Death by Wrongful Act*, § 1; *Thomas on Neg.* 488; *Ray on Negligence of Imposed Duties*, § 168 *et seq.*; *Shearm. & Redf. on Neg.* (5th ed.), chap. 8, § 124 *et seq.*; 8 Am. & Eng. Ency. of Law (2d ed.), p. 851. The earliest case is *Higgins v. Butcher*, Yelverton, 89 (1607). See 2 Rolle's Abr. 575. To the same effect are *Osborn v. Gillett*, L. R., 8 Exch. 88 (1873); 42 L. J. Exch. 53; *Carey v. Berkshire &c. R. R. Co.*, 1 Cush. 475 (1848); *Eden v. Lexington &c. R. R. Co.*, 14 B. Mon. 165 (1853); *Needham v. Grand Trunk R. R.*

the injury abated upon the death of the person injured.⁷² The Latin maxim, *actio personalis moritur cum persona*, being applicable.⁷³ Actions for losses sustained by surviving relatives are wholly statutory.⁷⁴ The courts have given different rea-

Co., 38 Vt. 294 (1865); Pennsylvania R. R. Co. v. Adams, 55 Pa. St. 499 (1867); Myers v. Holborn, 29 Vr. 193, 195 (1895). Early American cases *contra*: Cross v. Guthery, 2 Root, 90 (Conn. 1794); overruled, Connecticut Mut. Life Ins. Co. v. New York &c. R. R. Co., 25 Conn. 265 (1856); Ford v. Monroe, 20 Wend. 210 (1838); overruled, Green v. Hudson River R. R. Co., 2 Keyes, 294 (1866). See McGovern v. New York &c. R. R. Co., 67 N. Y. 417 (1876); Plummer v. Webb, 1 Ware, 69 (1825); Cutting v. Seabury, 1 Sprague, 522 (1860); Sullivan v. Pacific R. R. Co., 3 Dill. 334 (1874); overruled, Mobile Life Ins. Co. v. Brame, 95 U. S. 755 (1877); The Harrisburg, 119 id. 199 (1886); Shields v. Young, 15 Ga. 349 (1854); approved, Chick v. Southwestern R. R. Co., 57 id. 357 (1876); McDowell v. Georgia R. R. Co., 60 id. 320 (1878). Under the Missouri statute providing for the survival of actions. James v. Christie, 18 Mo. 162 (1853), cited in Stanley v. Bircher, 78 id. 245 (1883). Since the twelfth century, as before that time, there seems to have been a schedule of prices in existence to be paid for the lives of men. Prof. Maitland in "Doomsday Book and Beyond."

⁷² Mobile Life Ins. Co. v. Brame, 95 U. S. 754, 759 (1877); Hollenbeck v. Berkshire R. R. Co., 9 Cush. 478, 480 (1852).

⁷³ In Green v. Hudson River R. R. Co., 2 Keyes, 294 (1866), it was said this principle was not applicable to the action brought by a

husband for his injuries and incidental damage to *him* for the killing of the wife.

⁷⁴ Brown v. Chicago &c. Ry. Co., Wis. (1898); 5 Am. Neg. Rep. 255.

Mr. Justice Hunt, of the Supreme Court of the United States, remarked that "the authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found." Mobile Life Ins. Co. v. Brame, 95 U. S. 754, 756 (1877); Kramer v. Market Street R. R. Co., 25 Cal. 434 (1864); Grosso v. Delaware &c. R. R. Co., 21 Vr. 317 (1888). "The rule has been applied equally in actions brought by the husband for the death of the wife." Hyatt v. Adams, 16 Mich. 180 (1867); Green v. Hudson River R. R. Co., 2 Keyes, 294 (1866); Grosso v. Delaware &c. R. R. Co., 21 Vr. 317 (1888); Dickens v. New York &c. R. R. Co., 23 N. Y. 158 (1861). "By the wife for the death of the husband." Lyons v. Woodward, 49 Me. 29 (1860); Wyatt v. Williams, 43 N. H. 102 (1861). "By the parent for the death of a minor child." Little Rock &c. Ry. Co. v. Barker, 33 Ark. 350 (1878); Schefler v. Minneapolis &c. Ry. Co., 32 Minn. 125 (1884); Carey v. Berk-

sons for the rule. It is strange that on so important a subject there is no well-founded reason on which the rule is based. Leonard, J., says: "It is of no practical utility to search for the reason of the rule. It remains somewhat obscure."⁷⁵

§ 99. **Action at common law for incidental loss resulting from death.**— It is to be observed that the rule of the common law applies to an action to recover damages for the death only. There are, in some cases, indirect results flowing from the death to which this rule does not apply and for which an action will lie, such, for example, as the loss of service of the injured

shire R. R. Co., 1 Cush. 475 (1848). "By the widow suing in her right and as tutrix of her minor children." *Hubgh v. New Orleans &c. R. R. Co.*, 6 La. Ann. 495 (1851); *Hermann v. New Orleans &c. R. R. Co.*, 11 La. Ann. 51 (1856). "By the executor or administrator suing in his representative capacity." *Kearney v. Boston &c. R. R. Co.*, 9 Cush. 108 (1851); *Crowley v. Panama R. R. Co.*, 30 Barb. 99 (1859). "By an insurance company suing to recover damages by reason of having been forced to pay an insurance policy on the life of a person killed by the defendant." *Connecticut Mut. Life Ins. Co. v. New York &c. R. R. Co.*, 25 Conn. 265 (1856); *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754 (1877); *Tiffany on Death by Wrongful Act*, § 11. "By an orphan child for causing death of uncle who supported the child." *Hindry v. Holt*, 24 Colo. 464 (1897).

⁷⁵ *Green v. Hudson River R. R. Co.*, 2 Keyes, 294 (1866); 2 Abb. Dec. 277. See article in *Am. Law Rev.*, p. 128. It has been suggested that the reason of the rule was based on the law of forfeiture. *Shields v. Young*, 15 Ga. 349 (1854); denied in *Grosso v. Delaware &c.*

R. R. Co., 21 Vr. 317 (1888); *Hyatt v. Adams*, 16 Mich. 180, 185 (1867). Or the doctrine of merger, see *Wells v. Abrahams, L. R.*, 7 Q. B. 554, 557 (1872). Although the defendant be criminally liable, he is liable in a civil action. *Kain v. Larkin*, 56 Hun, 79 (1890); denied in *Osborn v. Gillett*, L. R., 8 Exch. 88 (1873); *Hyatt v. Adams*, 16 Mich. 180, 185 (1867); *Grosso v. Delaware &c. R. R. Co.*, 21 Vr. 317, 320 (1888). The principle *actio personalis moritur cum persona*, i. e., the right of action dies with the person who was a party to the suit, is not applicable. *Green v. Hudson River R. R. Co.*, 2 Keyes, 294 (1866); 2 Abb. Dec. 277. The Michigan Supreme Court says the reason rests on public policy. *Hyatt v. Adams*, 16 Mich. 180, 187 (1867). "The awful magnitude of the wrong 'has been assigned as the reason' why neither court nor jury have ever been trusted by the law with the function of estimating it. It is manifestly not one reason, but many, which lie at the basis of the common-law rule." *Connecticut Mut. Life Ins. Co. v. New York &c. R. R. Co.*, 25 Conn. 265, 272 (1856).

person during the period between the injury and the death.⁷⁶ So, where the death is caused by a tortious breach of contract, such as the contract which exists between passenger and carrier, the executor or administrator, although he could not sue in tort, may sue in contract, and recover damages suffered by the decedent's estate.⁷⁷ In New Hampshire it has been held that when the breach of contract results in an injury purely personal, the action does not survive, being an exception to the rule of actions *ex contractu*.⁷⁸ When death results, two causes of action may arise — one in favor of the decedent for his loss and suffering resulting from the injury in his lifetime, the other founded on his death, or on the damages resulting from his death, to his widow and next of kin.⁷⁹ Lord Campbell's

- ⁷⁶ *Baker v. Bolton*, 1 Campb. 493 (1808); *Covington Street Ry. Co. v. Packer*, 9 Bush, 455 (1877); *Hyatt v. Adams*, 16 Mich. 180 (1867); *Natchez &c. R. R. Co. v. Cook*, 63 Miss. 38 (1885); *Nickerson v. Harriman*, 38 Me. 277 (1854). And where the statute gives a right of action for causing death the two actions may proceed *pari passu*, and a recovery in one will not bar a recovery in the other. *Davis v. St. Louis &c. Ry. Co.*, 53 Ark. 117 (1890); *Mowry v. Chaney*, 43 Iowa, 609 (1876); *Philippi v. Wolff*, 14 Abb. Pr. 196 (N. S. 1873); *Ford v. Monroe*, 20 Wend. 210 (1838); *Mayhew v. Burns*, 103 Ind. 328 (1885). And any incidental expenses incurred during that time for medical attention to, and care and nursing. *Natchez &c. R. R. Co. v. Cook*, 63 Miss. 38 (1885); *Covington Street Ry. Co. v. Packer*, 9 Bush, 455 (1872). A loss occasioned by the deceased's inability to attend to business during the interval between his injury and death, in an action for a breach of contract, where the plaintiff was a passenger who was injured. *Bradshaw v. Lancashire &c. Ry. Co.*, L. R., 10 C. P. 189 (1875).
- ⁷⁷ *Tiffany on Death by Wrongful Act*, § 18; *Winnegar v. Central Pass. Ry. Co.*, 85 Ky. 547, 552 (1887); *Bradshaw v. Lancashire &c. Ry. Co.*, L. R., 10 C. P. 189 (1875); *Leggott v. Great Northern Ry. Co.*, 1 Q. B. D. 599 (1876); *Steamship City of Brussels*, 6 Ben. 370 (1873); *Knights v. Quarles*, 2 Brod. & B. 102 (1820).
- ⁷⁸ *Vittum v. Gilman*, 48 N. H. 416 (1869); *Jenkins v. French*, 58 id. 532 (1879). Held, in New York, that such actions survived under the statute which preserved from abatement "wrongs done to the property, rights, or the interest of another." *Cregin v. Brooklyn &c. R. R. Co.*, 75 N. Y. 192 (1878); 83 id. 595 (1881). See *Crowley v. Panama R. R. Co.*, 30 Barb. 99 (1859).
- ⁷⁹ *Needham v. Grand Trunk R. Co.*, 38 Vt. 294 (1865). The former is reserved by the act of 1847 (Laws of 1847, p. 29, No. 42), and the latter is under the act of 1849 (Laws of 1849, p. 7, No. 8); both actions are to be prosecuted.

Act provides that not more than one action shall lie for and in respect of the same subject-matter of complaint.⁸⁰

§ 100. **Lord Campbell's act — American statutes.**— The statute which is known as Lord Campbell's Act was passed by the British Parliament in 1846.⁸¹ It creates or provides a remedy by civil action for causing the death of a human being, and gives to the personal representatives of a person killed by the wrongful act, neglect or default of another, a right of action to recover damages for causing such death. This statute has been the parent of all the legislation on this subject in the United States. The first in point of time was passed by the legislature of the State of New York in 1847; since that time, all the States and Territories of the American Union. The District of Columbia and the Provinces of Canada have passed statutes providing for a civil remedy, or giving a right of action to recover damages for the negligent or wrongful killing of a human being. These statutes differ not only in the terms and language in which they are expressed, but also in respect to the persons by whom or for whose benefit the action may be brought, as well as the measure of damages.⁸²

in point of form in the name of his personal representative, but the damages in the two suits are given upon entirely different principles, and for different purposes. *Ib.* See *Legg v. Britton*, 64 Vt. 652 (1890), distinguishing *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294 (1865).

⁸⁰ 9 & 10 Vict., chap. 93, § 3. The same provision is contained in the statute of New Brunswick. *Consol. Stat.*, chap. 86, § 5; *Nova Scotia Rev. Stats.* 1884, chap. 116, § 3; *Ontario Rev. Stats.* 1887, chap. 135, § 5; *Quebec Civil Code*, L. Can., art. 1056; *Maryland Pub. Gen. Laws*, art. 67, § 2.

⁸¹ 9 & 10 Vict., chap. 93; amended 27 & 28 Vict., chap. 95.

⁸² *England*: 9 & 10 Vict., chap. 93; amended, 27 & 28 Vict., chap. 93.

New Brunswick: *Consol. Stats.*, chap. 86.

Nova Scotia: *Rev. Stats.* 1884, chap. 116.

Ontario: *Rev. Stats.* 1887, chap. 135.

Quebec: *Civil Code*, L. Can., art. 1056.

Alabama: *Code* 1887, § 2589.

Arizona: *Rev. Stats.* 1887, art. 2145.

Arkansas: *Dig. Stats.* 1894, § 5911.

California: *Code Civ. Pro.*, §§ 376, 377.

Colorado: *Miles' Stats.* 1891, §§ 1509–1511.

Connecticut: *Gen. Stats.* 1888, §§ 1008, 1009.

Delaware: *Rev. Stats.* 1852, chap. 105; amended, 1874.

District of Columbia: *Comp. Stats.* 1894, chap. 49.

§ 101. **Special statutory provisions.**— In some of the States the statute provides that the right of action of the party injured shall survive in case death results from the injury.⁸³

- Florida: Rev. Stats. 1892, §§ 2342-2344.
 Georgia: Code 1887, § 588.
 Idaho: Rev. Stats. 1891, §§ 4099, 4100.
 Illinois: Rev. Stats. 1895, chap. 70, §§ 1, 2.
 Indiana: Rev. Stats. 1894, §§ 267, 285.
 Iowa: Rev. Stats. 1888, §§ 2525-2527.
 Kansas: Comp. L. 1885, chap. 80, § 422; amended, 1889, chap. 131.
 Kentucky: Const., § 241; Gen. Stats., chap. 57, § 3; Stats. 1894, chap. 1, § 6.
 Louisiana: Rev. Civil Code 1889, art. 2315.
 Maine: Stats. 1891, chap. 124.
 Maryland: Poe's Code 1888, art. 67, §§ 1-4.
 Massachusetts: Pub. Stats. 1882, chap. 52, § 17; chap. 73, § 6; chap. 112, § 212; amended, 1883; Stats. 1886, chap. 140.
 Michigan: Howell's Stats. 1883, § 8313.
 Minnesota: Gen. Stats. 1894, § 5913.
 Mississippi: Code 1892, § 663.
 Missouri: Rev. Stats. 1889, § 4426.
 Montana: Code Civ. Pro. 1895, §§ 578, 579.
 Nebraska: Comp. Stats. 1895, § 2503.
 Nevada: Comp. Laws 1885, § 3898.
 New Hampshire: Pub. Stats. 1891, chap. 191, §§ 8-14.
 New Jersey: Gen. Stats. of N. J. (vol. 1), p. 1188, § 11.
 New Mexico: Comp. Laws 1885, § 2309; amended, 1891, chap. 49.
 New York: Code Civ. Pro., §§ 1902-1904; amended, 1895.
 North Carolina: Code 1883, § 1498.
 North Dakota: Code 1895, § 5974.
 Ohio: Rev. Stats. 1894, § 6134.
 Oklahoma: Comp. Stats. 1893, §§ 4311, 4313.
 Oregon: Code Civ. Pro. 1892, § 371.
 Pennsylvania: Brightly's Purd. Dig. 1894, p. 1603, §§ 1-7.
 Rhode Island: Pub. Stats. 1882, chap. 204, § 20.
 South Carolina: Rev. Stats. 1893, § 2315.
 South Dakota: Comp. L. 1887, §§ 5498, 5499; Laws of 1891, chap. 4.
 Tennessee: Code 1896, §§ 4025-4029.
 Texas: Rev. Stats. 1888, § 2899.
 Utah: Comp. L. 1888, §§ 2961, 3178, 3179.
 Vermont: Comp. Stats. 1894, § 2451.
 Virginia: Code 1887, § 2902.
 Washington: Code Pro. 1891, § 138.
 West Virginia: Code 1891, chap. 103, § 5.
 Wisconsin: Ann. Stats. 1889, § 4255.
 Wyoming: Code 1887, § 2364a.
⁸³ This is so in
 Connecticut: Gen. Stats. 1888, §§ 1008, 1009.
 Iowa: McClain's Ann. Code, § 3730.
 Louisiana: Civil Code, art. 2315; amended by Laws of 1884, p. 94.
 New Hampshire: Pub. Stats. 1891, chap. 191, § 8.
 Tennessee: Mill & V. Code, § 3130.

Thus the Iowa statute provides that "all causes of actions shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same." Under these statutes the question has arisen whether the action could be maintained when the death was instantaneous. The Massachusetts courts have repeatedly held that in such cases the action could not be maintained because there was the absence of a perfect cause of action before death.⁸⁴ Those statutes "which create a new cause of action, and give damages for the injury resulting from the death, it is immaterial whether the death is or is not instantaneous."⁸⁵ By statute in some States, a special action is provided in favor of the father or mother for causing the death of a child.⁸⁶ So by statute in some States, a special action is provided against railroad companies or other public carriers when life is lost through their negligence or carelessness.⁸⁷ In Maine and Massachusetts, the damages are in the nature of a fine, recovered by indictment, for the use of the widow and children of the deceased, or if none, then to the use of the heirs or next of kin. In Virginia the statute provides for a libel *in rem* against a ship or vessel, or a libel *in personam*, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as

⁸⁴ *Kearney v. Boston &c. R. R. Co.*, 9 Cush. 108 (1851); *Hollenbeck v. Berkshire R. R. Co.*, id. 478 (1852); *Bancroft v. Boston &c. R. R. Co.*, 11 Allen, 34 (1865); *Tully v. Fitchburg R. R. Co.*, 134 Mass. 499 (1883); *Kennedy v. Standard Sugar Refinery*, 125 id. 90 (1878); *Nourse v. Packard*, 138 id. 307 (1885); *Mulcahey v. Washburn &c. Co.*, 145 id. 281 (1887).

⁸⁵ *Tiffany on Death by Wrongful Act*, § 73; *Brown v. Buffalo &c. R. R. Co.*, 22 N. Y. 191, 194 (1860); *International &c. R. R. Co. v. Kindred*, 57 Tex. 491 (1882).

⁸⁶ See § 119.

⁸⁷ This is so in

Arizona: Rev. Stats. 1887, § 2145.

Colorado: Gen. Stats. 1883, §

Kentucky: Gen. Stats., chap. 57, § 1. Or by willful neglect may recover punitive damages. Id., § 3.

Maine: Rev. Stats. 1883, chap. 51, § 68.

Massachusetts: Pub. Stats. 1882, chap. 23, § 6; chap. 112, §§ 212, 213; Stats. 1883, chap. 243; Stats. 1886, chap. 140.

Missouri: Rev. Stats. 1889, § 4425.

New Mexico: Comp. Laws 1884, § 2308; amended by Laws of 1891, chap. 49.

North Dakota: Comp. Laws of Dakota 1887, § 5498.

Rhode Island: Pub. Stats., chap. 204, § 15.

Texas: Sayles' Civil Stats., art. 2899, §§ 1, 2.

amount in law to a felony.⁸⁸ By statute, an action is given against a person killing another in a duel, the surviving principal, the seconds, and all others aiding or promoting the duel.⁸⁹ So an action is given for a willful violation of the Miners Act, causing injury or loss of life.⁹⁰ So when a life is lost through any defect or want of repair, or sufficient railing, in any highway, townway, causeway, or bridge.⁹¹

§ 102. **Distinguishing features of the action.**— Mr. Tiffany, in his valuable book on Death by Wrongful Acts, says: "The distinguishing features of the new action are three in number: (1) That it may be maintained whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled the party injured to maintain an action; (2) that it is for the exclusive benefit of certain designated members of the family of the deceased; and (3) that the damages recoverable are such as result to the beneficiaries from the death."⁹²

⁸⁸ Virginia: Code 1887, § 2902.

⁸⁹ This is so in

Kentucky: Gen. Stats., chap. 32, § 1. Or where a person is killed by the careless, wanton, or malicious use of firearms. Gen. Stats., chap. 1, § 6.

Washington: Hill's Ann. Stats. & Code 1891, § 138.

Ontario: Rev. Stats. 1887, chap. 135, § 4.

Quebec: Civil Code, L. Can., art. 1056.

Georgia: Code 1882, § 2971; amended, Laws 1887, p. 43. The action is for *homicide*.

⁹⁰ Illinois: 3 Starr & C. Ann. Stats., chap. 93, § 14.

Missouri: Rev. Stats. 1889, § 7074.

Pennsylvania: Brightly's Purd. Dig. Supp., p. 2252, § 70.

⁹¹ Maine: Rev. Stats. 1883, chap. 18, § 80.

Massachusetts: Pub. Stats. 1882, chap. 52, § 17.

Washington: Hill's Ann. Stats. & Code 1891, § 138, provides "when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place."

For a full compilation of the statutes, with an analytical table, see Tiffany on Death by Wrongful Act. For a comparative and comprehensive study of these statutes nothing could be more useful.

⁹² § 22. In order that a cause of action under Lord Campbell's Act and similar statutes shall exist, it is necessary that the following circumstances concur: (1) That the death shall have been caused

§ 103. **The statute creates a new right of action.**— Some of the cases hold, and the weight of authority seems to be on the side, viz., that the statute gives a new right of action,⁹³ and not a substituted right of action.⁹⁴ If the injured person brings a suit and recovers damages for the injury in his lifetime, in case death subsequently results from the injury, his personal representatives cannot maintain an action for the death.⁹⁵

§ 104. **Liberal or strict construction.**— These statutes have, by some courts, been declared to be remedial and are entitled to receive the liberal construction which appertains to remedial statutes,⁹⁶ and by other courts it is said they are in derogation

by such wrongful act, neglect, or default of the defendant that an action might have been maintained therefor by the party injured if death had not ensued; (2) that there be in existence some one of the persons for whose benefit the action may be brought; (3) that there be in existence a proper party plaintiff,—that is, that an executor or administrator shall have been appointed,—unless the statute authorizes the action to be brought directly by the beneficiaries; (4) that the time within which the action must be brought has not elapsed; and (5) according to some authorities, that the beneficiaries, or some one of them, shall have suffered pecuniary loss by reason of the death. Whether, if no pecuniary loss has been sustained, the action may be maintained for nominal damages, is a question upon which there is a conflict of authority. *Tiffany on Death by Wrongful Act*, § 60.

The word "wrongful," as used in the statute, does not mean intentional, willful or malicious. *McLean v. Burbank*, 12 Minn. 530, 533 (1867); *Baker v. Bailey*, 16 Barb. 54 (1852); *State v. Baltimore &*

R. R. Co., 24 Md. 84, 101 (1865); *Evans v. Newland*, 34 Ind. 112 (1870).

⁹³ *Blake v. Midland Ry. Co.*, 18 Q. B. 93, 101 (1852); 18 Ad. & El. (N. S.) 93; *Littlewood v. Mayor &c. of New York*, 89 N. Y. 24, 27 (1882); *Whitford v. Panama R. R. Co.*, 23 N. Y. 465 (1861); *Smith v. Louisville &c. R. R. Co.*, 75 Ala. 449 (1883); *Munro v. Pacific Coast &c. Co.*, 84 Cal. 515 (1890); *Adams v. Northern Pacific Ry. Co.*, 95 Fed. Rep. 938 (1899).

⁹⁴ *Leggott v. Great Northern Ry. Co.*, 1 Q. B. D. 599 (1876); *Whitford v. Panama R. R. Co.*, 23 N. Y. 465 (1861); *Hamilton v. Jones*, 125 Ind. 176, 179 (1890).

⁹⁵ *Littlewood v. Mayor &c. of New York*, 89 N. Y. 24 (1882), under chap. 450, Laws of 1847 of N. Y.; *Read v. Great Eastern Ry. Co.*, L. R., 3 Q. B. 555 (1868).

⁹⁶ *Haggerty v. Central R. R. Co.*, 2 Vr. 349, 350 (1865); *Murphy v. Board of Chosen Freeholders*, 28 id. 244, 250 (1894); *Bolinger v. St. Paul &c. R. R. Co.*, 36 Minn. 418, 421 (1887); *Merkle v. Bennington Township*, 58 Mich. 156 (1885); *Lamphear v. Buckingham*, 33 Conn. 237 (1866); *Wabash &c. Ry.*

of the common law and should be construed strictly.⁹⁷ Thus, in New Jersey, it was held that the word "corporation" includes all classes of corporations, private and public, as well as those of a *quasi*-public character, such as the Board of Chosen Freeholders.⁹⁸ It includes a trustee or receiver;⁹⁹ also the State.¹

§ 105. **The constitutions and the statutes.**— The New York Constitution of 1894 provides that the right of action for damages for injuries resulting in death shall not be abrogated, and the amount recoverable shall not be limited by statute.² There

Co. v. Shacklett, 10 Ill. App. 404, 406 (1882); Beach v. Bay State Co., 6 Abb. Pr. 415 (1858); Hayes v. Williams, 17 Colo. 465 (1892); Lang v. Houston & c. R. R. Co., 75 Hun, 151 (1894).

⁹⁷ Tiffany on Death by Wrongful Act, § 32; Hamilton v. Jones, 125 Ind. 176, 178 (1890); Stewart v. Terre Haute & c. R. R. Co., 103 id. 44 (1885); Daly v. Stoddard, 66 Ga. 145, 148 (1880); Pittsburg & c. Ry. Co. v. Hine, 25 Ohio St. 629 (1874); Jackson v. St. Louis & c. Ry. Co., 87 Mo. 422 (1885). The penal part of the statute only should be construed strictly. Board of Shelby Co. v. Searce, 2 Duv. 576, 579 (1864). The Massachusetts statutes "while penal in form are largely remedial in character." Commonwealth v. Boston & c. R. R. Co., 121 Mass. 36 (1876). "The statute is highly penal in its terms, and must be construed as a penal statute." Smith v. Louisville & c. R. R. Co., 75 Ala. 449, 450 (1883).

⁹⁸ Murphy v. Board of Chosen Freeholders, 28 Vr. 245 (1894). See Southwestern R. R. Co. v. Paulk, 24 Ga. 356 (1858); Chase v. American Steamboat Co., 10 R. I. 79 (1871); Donaldson v. Mississippi & c. R. R. Co., 18 Iowa, 280 (1865).

⁹⁹ Texas & c. Ry. Co. v. Cox, 145

U. S. 593 (1892); Little v. Dusenberry, 17 Vr. 614 (1884); Lamphear v. Buckingham, 33 Conn. 237 (1866); Meora v. Holbrook, 20 Ohio St. 137 (1870).

¹ Bowen v. State, 108 N. Y. 166 (1888); Splittorf v. State, 108 id. 205 (1888).

² Art. 1, § 18.

Arkansas: Const., art. 5, § 32, provides that "no act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such action shall be prosecuted;" the same provision is found in the Constitution of *Pennsylvania*. Const. 1874, art. 3, § 21.

Kentucky: Const. 1891, § 241. The constitutional provision was self-executing. Thomas v. Royster, 98 Ky. 206 (1895).

Mississippi: Const. 1890, § 193, provides that the legal or personal representatives of employes shall have the same rights and remedies as are allowed by law to such representatives of other persons.

Texas: Const. 1876, art. 16, § 26, gives a right of action for

are but few reported cases in which the constitutionality of these statutes has been passed upon by the courts. They do not impair the obligation of contracts.³ They are not unconstitutional when made to apply exclusively to railroad corporations.⁴ When the right of action has accrued, the repeal of the statute does not destroy such right of action under the Constitution of Colorado.⁵ These statutes do not constitute an encroachment upon the commercial power of Congress.⁶

§ 106. Where the action may be brought — Federal courts — Courts in admiralty.— Where the death was caused in the same State in which the parties reside, who are entitled under the statute to bring the action, no question can arise as to their right to bring the action in the courts and under the statute of that State. The United States courts have jurisdiction of this class of cases the same as in other cases where the citizenship of the parties is such as to confer jurisdiction.⁷ This is so, notwithstanding a proviso in the statute that the damages are recover-

exemplary damages for "homicide through willful act or omission, or gross neglect." *Winnt v. International &c. R. R. Co.*, 74 Tex. 32 (1889).

³ *Boston &c. R. R. Co. v. State*, 32 N. H. 215, 225 (1855); *Board of Shelby Co. v. Scearce*, 2 Duv. 576 (1864); *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356, 363 (1858); *Georgia R. R. &c. Co. v. Oaks*, 52 id. 410 (1874).

⁴ *Boston &c. R. R. Co. v. State*, 32 N. H. 215 (1855). Although section 2899 of Ala. Code 1876, which gives an action exclusively against incorporated companies and private associations, was held unconstitutional. *Smith v. Louisville &c. R. R. Co.*, 75 Ala. 449 (1883). § 2589, Code of Ala. 1886, does not interfere with the constitutional guaranties with reference to arrest, conviction and punishment in criminal cases under the statute; it is not unconstitutional. *Rich-*

mond &c. R. R. Co. v. Freeman, 97 Ala. 289 (1893).

⁵ *Denver &c. Ry. Co. v. Woodward*, 4 Colo. 162 (1878); *Lundin v. Kansas Ry. Co.*, id. 433 (1878). An amendment to a statute authorizing the recovery of additional damages cannot be invoked after the right of action had accrued under the original statute. *Chicago &c. R. R. Co. v. Pounds*, 11 Lea, 127, 130 (1883).

⁶ *Sherlock v. Alling*, 93 U. S. 99 (1876).

⁷ *Dennick v. Central R. R. Co.*, 103 U. S. 11 (1880); *Chicago &c. Ry. Co. v. Whitton*, 13 Wall. 270 (1871); *American Steamboat Co. v. Chase*, 16 id. 522 (1872); *Lung Chung v. Northern Pacific Ry. Co.*, 19 Fed. Rep. 254 (1884); *Holmes v. Oregon &c. R. R. Co.*, 5 id. 75 (1880). It is sufficient if the administrator is a citizen of another State. *Harper v. Norfolk &c. R. R. Co.*, 36 Fed. Rep. 102 (1887). An

able in the State court only, such as the Wisconsin statute,⁸ which requires an action under it to be brought in a court of that State.⁹ The United States Supreme Court decided that a suit in admiralty cannot be maintained for the death of a human being, independent of a statute creating such a right of action.¹⁰ Nor can a suit *in rem* be maintained in the admiralty courts for causing the death of a human being, where no lien is expressly created by the local law.¹¹ Held otherwise where the State statute gives a lien.¹² So the jurisdiction of the admiralty courts of suits *in personam*, for actions arising under State statutes creating a right of action for causing the death of a human being, has been sustained.¹³

administrator may be selected for the express purpose of conferring jurisdiction. *Goff v. Norfolk &c. R. R. Co.*, 36 Fed. Rep. 299 (1888). See *Weaver v. Baltimore &c. R. R. Co.*, 21 D. C. 499 (1893).

⁸ Wisconsin: Ann. Stats. 1889, § 4255.

⁹ *Bigelow v. Nickerson*, 70 Fed. Rep. 113 (1895); 17 C. C. App. 1; *Chicago &c. Ry. Co. v. Whitton*, 13 Wall. 270 (1871).

¹⁰ *The Alaska*, 130 U. S. 201 (1889); *The Harrisburg*, 119 id. 199 (1886).

¹¹ *The Corsair*, 145 U. S. 335 (1891).

¹² *The Oregon*, 45 Fed. Rep. 62 (1891).

¹³ *The Clatsop Chief*, 8 Fed. Rep. 163 (1881); *Holmes v. Oregon &c. Ry. Co.*, 5 id. 75 (1880); *Holland v. Brown*, 35 id. 43 (1888). A statute which gives a right of action *in personam* does not thereby give a right of action *in rem* in a similar case in admiralty. *The Manhasset*, 18 Fed. Rep. 918 (1884). Mr. Tiffany in his book on *Death by Wrongful Act*, § 207, reviews at some length the decisions of the United States courts and says: "In view of the conflict of opin-

ions that exists in the decisions, it can hardly be denied that, pending a decision by the Supreme Court, the jurisdiction of the courts of admiralty *in personam* and their jurisdiction *in rem*, although the local law creates a lien, must both be considered to be open questions." See *Thomas on Neg.* 502. The Virginia statute provides that parties may proceed *in rem* against the offending ship or vessel or *in personam* against the owners or those responsible for her acts or default or negligence. Code 1887, § 2902.

In the case of *Butler v. Boston &c. S. Co.*, 130 U. S. 527, 558 (1889), Mr. Justice Bradley said: "It might be a much more serious question, whether a State law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress has created such liability." See *A. W. Thompson*, 39 Fed. Rep. 115 (1889); *Jones v. St. Nicholas*, 49 id. 671 (1891). So doubt has been likewise expressed as to the power of a State to create a maritime lien in such

§ 107. Death and action in different States — *Lex fori*.—

The United States Supreme Court and many of the State courts have held that, where the death occurred in one State, an action could be maintained in another State, provided the statutes in both States giving a right of action for causing the death were "substantially similar."¹⁴ The foreign statute need not be precisely and in all respects like the statute of the State in

cases. The *Manhasset*, 18 Fed. Rep. 918 (1884); The *Sylvan Glen*, 9 id. 335 (1881); *Welsh v. The North Cambria*, 40 id. 655 (1889).

¹⁴United States: *Dennick v. Central R. R. Co.*, 103 U. S. 11 (1880), brought in New York under the New Jersey statute; *Texas &c. Ry. Co. v. Cox*, 145 U. S. 593 (1892), brought in Texas under the Louisiana statute; in the last case it was said that the suit will lie where the statute of the State in which the cause of action arose is not in substance inconsistent with the statute or public policy of the State in which the right of action is sought to be enforced. The right to recover and the limit of the amount of the judgment are governed by the *lex loci* and not by the *lex fori*. *Northern Pacific R. R. Co. v. Babcock*, 154 U. S. 190 (1893), overruling *Mackay v. Central R. R. Co.*, 14 Blatchf. 65; 4 Fed. Rep. 617 (1880).

District of Columbia: *Weaver v. Baltimore &c. R. R. Co.*, 21 D. C. 499 (1893). See 3 App. D. C., brought in the District of Columbia under West Virginia statute.

Georgia: *South Carolina R. R. Co. v. Nix*, 68 Ga. 572 (1882), brought in Georgia, under the South Carolina statute; *Central R. R. Co. v. Swint*, 73 Ga. 651 (1884), brought in Georgia under the Alabama statute; *Western &c. R. R. Co. v. Strong*, 52 Ga. 461 (1874),

brought in Georgia under the Tennessee statute.

Illinois: *Shedd v. Moran*, 10 Bradw. 618 (1882), brought in Illinois under the Indiana statute; *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116 (1891), brought in Illinois under the Canadian statute. The fact that in such case the statute of this State limits a recovery to a certain sum, and the foreign statute leaves the amount to be fixed by the verdict of a jury, is not a difference that affects the right to prosecute the action. *Ib.*

Indiana: *Burns v. Grand Rapids &c. R. R. Co.*, 113 Ind. 169 (1887), brought in Indiana under the Michigan statute; *Cincinnati &c. R. R. Co. v. McMullen*, 117 Ind. 439 (1888), brought in Indiana under the Ohio statute.

Iowa: *Morris v. Chicago &c. Ry. Co.*, 65 Iowa, 727 (1885). See 63 id. 70, brought in Iowa under the Illinois statute; *Hyde v. Wabash &c. Ry. Co.*, 61 Iowa, 441 (1883), brought in Iowa under the Missouri statute.

Kentucky: *Bruce v. Cincinnati &c. R. R. Co.*, 83 Ky. 174 (1885), overruling *Taylor v. Pennsylvania Co.*, 78 Ky. 348 (1880), brought in Kentucky under the Tennessee statute; *Louisville &c. R. R. Co. v. Graham*, 98 Ky. 688 (1896), brought in Kentucky under the Alabama statute.

Mississippi: *Chicago &c. R. R.*

which the action is brought. It is sufficient if the policy of the two statutes is similar, and if they are founded upon the same principle, and give substantially the same right of action for the redress of similar wrongs. It makes no difference that the nominal plaintiff may be one person in the State in which the action is given, and another person in the State in which the action is brought, provided the action, in whosoever name it is to be maintained, is seeking a similar remedy.¹⁵ These decisions are based upon the principle that a right of action is created by the statute of the State where the death was caused.

Co. v. Doyle, 60 Miss. 977 (1883), brought in Mississippi under the Tennessee statute; Illinois Central R. R. Co. v. Crudup, 63 Miss. 291 (1885), brought in Mississippi under the Tennessee statute.

Nebraska: Missouri Pacific Ry. Co. v. Lewis, 24 Neb. 848 (1888), brought in Nebraska under the Kansas statute.

New Jersey: See Lower v. Segal, 30 Vr. 66 (1896); 31 id. 99 (1897), brought in New Jersey under the Pennsylvania statute.

New York: Leonard v. Columbia &c. Co., 84 N. Y. 48 (1881), brought in New York under the Connecticut statute; in that case it was said that it is not essential that the statutes should be *precisely* the same. Wooden v. Western &c. R. R. Co., 126 N. Y. 10 (1891), brought in New York under the Pennsylvania statute; the New York statute was then limited in the amount of recovery to \$5,000; the Pennsylvania statute was unlimited; the court held, that the plaintiff must submit to the limitation, although none was imposed by the laws of Pennsylvania. See Beach v. Bay State Steamboat Co., 30 Barb. 433 (1859).

Pennsylvania: Knight v. West Jersey R. R. Co., 108 Pa. St. 250

(1885), brought in Pennsylvania under the New Jersey statute.

Tennessee: Nashville &c. R. R. Co. v. Sprayberry, 9 Heisk. 852 (1872), brought in Tennessee under the Mississippi statute; Mississippi &c. R. R. Co. v. Ayres, 16 Lea, 725 (1886), brought in Tennessee under the Mississippi statute.

Vermont: McLeod v. Connecticut &c. R. R. Co., 58 Vt. 727 (1886), brought in Vermont under the Province of Quebec statute; Adams v. Fitchburg R. R. Co., 67 Vt. 76 (1894), brought in Vermont under chap. 112, § 212, Pub. Stats. Mass.; the court held, that no action can be maintained in Vermont upon the *penal* statute of another State, and that the statute of Massachusetts was a *penal* statute.

Virginia: Nelson v. Chesapeake &c. R. R. Co., 88 Va. 971 (1892), brought in Virginia under the West Virginia statute; the court said if the West Virginia statute was a *penal* statute an action under it could not be maintained in the State of Virginia, and a recovery in the action in the State of Virginia will be a complete bar to another action, in Virginia or elsewhere, for the same wrong.

¹⁵ Hanna v. Grand Trunk Ry. Co., 41 Ill. App. 116, 127 (1891).

The fact that it is a statutory right cannot vary the principle applicable to a personal injury, an action to redress which may be brought at common law wherever service from a court of competent jurisdiction can be made upon the wrongdoer, and that a party legally liable in one State cannot escape that liability by going into another State, as stated in the case cited from the Supreme Court of the United States, that the suit will lie where the statute of the State in which the cause of action arose is not in substance inconsistent with the statute or public policy of the State in which the right of action is sought to be enforced. The New York Court of Appeals held that the plaintiff must submit to the limitation in the statute of the State where the suit is brought as to the amount of damages, although none was imposed by the statute of the State in which the death occurred.¹⁶ There must be an allegation and proof of a similar statute in the State where the death was caused.¹⁷ The right of action founded on death arises where the injury occurred and not where the administrator was appointed.¹⁸ It is necessary to allege and prove the foreign statute.¹⁹ So it has been held that an action may be maintained in the State courts, when the death was caused on the navigable waters of the United States, provided that such death was caused within the territorial limits of the State under whose statute the remedy

¹⁶ *Wooden v. Western &c. R. R. Co.*, 126 N. Y. 10 (1891).

¹⁷ *Debevoise v. New York &c. R. R. Co.*, 98 N. Y. 377 (1885). Defendant need not allege that the wrong was committed in another State. *Ib.*; *Selma &c. R. R. Co. v. Lacy*, 43 Ga. 461 (1871); *Hyde v. Wabash &c. Ry. Co.*, 61 Iowa, 441 (1883). See *Hamilton v. Hannibal &c. R. R. Co.*, 39 Kan. 56 (1888); *Beach v. Bay State Steamboat Co.*, 30 Barb. 433 (1859); *Kahl v. Memphis &c. R. R. Co.*, 95 Ala. 337 (1891); *Whitford v. Panama R. R. Co.*, 23 N. Y. 465 (1861); *McDonald v. Mallory*, 77 id. 546 (1879); *Leonard v. Columbia Steam Nav. Co.*, 84 id. 48 (1881). Being contrary to common law it will not be pre-

sumed that similar statutes exist elsewhere. *Debevoise v. New York &c. R. R. Co.*, 98 N. Y. 377 (1885).

¹⁸ *Lung Chung v. Northern Pac. Ry. Co.*, 19 Fed. Rep. 254 (1884).

¹⁹ *Hyde v. Wabash &c. Ry. Co.*, 61 Iowa, 441 (1883); *Debevoise v. New York &c. R. R. Co.*, 98 N. Y. 377 (1885); *Selma &c. R. R. Co. v. Lacy*, 43 Ga. 461 (1871); *State v. Pittsburgh &c. R. R. Co.*, 45 Md. 41 (1876); *Nashville &c. R. R. Co. v. Eakin*, 6 Coldw. 582 (1869); *Hobbs v. Memphis &c. R. R. Co.*, 12 Heisk. 526 (1873); *South Carolina R. R. Co. v. Nix*, 68 Ga. 572 (1882); *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48 (1881); *Kahl v. Memphis &c. R. R. Co.*, 95 Ala. 337 (1891).

is sought.²⁰ So it has been held in New York that an action could be maintained in the courts of that State, when the death was caused on the high seas, on a vessel owned and registered in a port of that State.²¹

§ 108. **Death and action in different States—Lex fori—Continued.**—On the other hand, the right to maintain such an action has been denied by many of the State courts.²² Many

²⁰ *Sherlock v. Alling*, 95 U. S. 99 (1876); *American Steamboat Co. v. Chase*, 16 Wall. 522 (1872); 9 R. I. 419 (1870); *Mahler v. Norwich & Transp. Co.*, 35 N. Y. 352 (1866), reversing 45 Barb. 226; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1 (1874), affirming 6 Lans. 430; *Opsahl v. Judd*, 30 Minn. 126 (1883).

²¹ *McDonald v. Mallory*, 77 N. Y. 546 (1879). See on this subject, *Tiffany on Death by Wrongful Act*, § 196; *Thomas on Neg.* 496; 8 Am. & Eng. Ency. of Law (2d ed.), p. 851; *Shearm. & Redf. on Neg.* (5th ed.), § 132.

²² *Alabama*: See *Alabama & C. R. R. Co. v. Carroll*, 97 Ala. 126 (1892); *Kahl v. Memphis & C. R. R. Co.*, 95 id. 337 (1891).

Kansas: *McCarthy v. Chicago & C. R. R. Co.*, 18 Kan. 48 (1877), brought in Kansas under the Missouri statute; *Hamilton v. Hannibal & C. R. R. Co.*, 39 Kan. 56 (1888), brought in Kansas under the Missouri statute; *Dale v. Atchison & C. R. R. Co.*, 57 Kan. 601 (1897); 1 Am. Neg. Rep. 46, brought in Kansas under the New Mexico statute, which was said by the court to be a penal statute, and penal statutes have no extra-territorial force and the courts of Kansas will not enforce the penal statutes of another State or Territory.

Maryland: *Ash v. Baltimore & C. R. R. Co.*, 72 Md. 144 (1890), brought in Maryland under the West Virginia statute.

Massachusetts: *Richardson v. New York & C. R. R. Co.*, 98 Mass. 85 (1867), brought in Massachusetts under the New York statute; *Davis v. New York & C. R. R. Co.*, 143 Mass. 301 (1887), brought in Massachusetts under the Connecticut statute; *Higgins v. Central & C. R. Co.*, 155 Mass. 176 (1891), brought in Massachusetts under the Connecticut statute; the deceased was instantly killed; it was held, the action could be maintained. *Distinguishing* 98 Mass. 85, and 143 id. 301. See *Chandler v. New Haven & C. R. R. Co.*, 159 Mass. 589 (1893).

Michigan: Not when the action is barred by limitation of the foreign statute. *Wingert v. Carpenter*, 101 Mich. 395 (1894), brought in Michigan under the Canada statute.

Missouri: *Vawter v. Missouri Pac. Ry. Co.*, 84 Mo. 679 (1884), brought in Missouri under the Kansas statute. *Contra*, *Stoeckman v. Terre Haute & C. R. R. Co.*, 15 Mo. App. 503 (1884), brought in Missouri under the Illinois statute. See *Oates v. Union Pacific Ry. Co.*, 104 Mo. 514 (1891), brought in Missouri under the Kansas stat-

of these decisions are placed on the ground of dissimilarity between the statute of the State where the action is brought and that of the State in which the death was caused, although some of them are placed on a different ground. It has been held that no action could be maintained in a State where such statute was in force, if there was no statute in the jurisdiction where the death was caused;²³ or if the statute of the State in which the death was caused was a penal statute.²⁴

ute; *Marshall v. Wabash R. R. Co.*, 46 Fed. Rep. 269 (1891).

Ohio: *Woodward v. Michigan &c. R. R. Co.*, 10 Ohio St. 121 (1859), brought in Ohio under the Illinois statute. See *Hover v. Pennsylvania Co.*, 25 Ohio St. 667 (1874).

Rhode Island: *O'Reilly v. New York &c. R. R. Co.*, 16 R. I. 388 (1889), brought in Rhode Island under the Massachusetts statute. Held, the Massachusetts statute was *penal* and the action could not be maintained; such suit may be maintained when the statutes of the two States are "substantially similar."

Texas: *Texas &c. R. R. Co. v. Richards*, 68 Tex. 375 (1887), brought in Texas under the Louisiana statute; *St. Louis &c. Ry. Co. v. McCormick*, 71 Tex. 660 (1888), brought in Texas under the Arkansas statute; *Willis v. Missouri Pac. Ry. Co.*, 61 Tex. 432 (1884), brought in Texas for the death caused in the Indian Territory in which there was no statute giving a right of action for causing death; *Belt v. Gulf &c. Ry. Co.*, 4 Tex. Civ. App. 231 (1893), brought in Texas under the Arkansas statute in force in the Indian Territory. Applied to an injury to a servant which occurred in the Republic of Mexico. *Mexican National*

Ry. Co. v. Jackson, 89 Tex. 107 (1896).

²³ *Whitford v. Panama R. R. Co.*, 23 N. Y. 465 (1861); *Crowley v. Panama R. R. Co.*, 30 Barb. 99 (1859); *id.* 433 (1859); *Campbell v. Rogers*, 2 Handy, 110 (1855); *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294 (1865); *Willis v. Missouri Pacific Ry. Co.*, 61 Tex. 432 (1884); *Belt v. Gulf &c. Ry. Co.*, 4 Tex. Civ. App. 231 (1893).

Gholson, J. "We take it to be clear that no such right of action existed at common law. It is a right of action given by statute, not to the intestate, but to his personal representatives; not as general assets, but as a trust for the widow and next of kin; in respect of a pecuniary loss they are supposed to have sustained. There are serious difficulties in allowing an Ohio administrator to undertake and discharge such a trust conferred by the laws of another State. It would be difficult to maintain that, without legislation, his oath or bond would extend to such a case." *Woodard v. Michigan Southern &c. R. R. Co.*, 10 Ohio St. 121, 123 (1859).

²⁴ *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76 (1894); *O'Reilly v. New York &c. R. R. Co.*, 16 R. I. 388 (1889); *Nelson v. Chesapeake &c. R. R. Co.*, 88 Va. 971 (1892).

§ 109. **Survival of beneficiaries necessary.**—Lord Campbell's Act provides: "That every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused." Most of the statutes contain like provisions. It has been held by a long line of cases until it is the settled law, that unless the deceased left surviving some one of the persons entitled to the benefit of the statute, no cause of action accrues, and that unless it be alleged in the pleadings and proved at the trial that some such person survives, the action cannot be maintained.²⁵ The beneficiary must be in existence when the action is brought.²⁶ Under the North Carolina, Virginia and West Virginia statutes, it has been held that the existence of husband, wife, parent or child is not necessary to the maintenance of the action.²⁷ Some of the

²⁵ *Tiffany on Death by Wrongful Act*, § 80; *Thomas on Neg.* 489, and cases there collected. The same rule applies where the remedy is by indictment. *Commonwealth v. Boston &c. R. R. Co.*, 121 Mass. 36 (1876); *Commonwealth v. Eastern R. R. Co.*, 5 Gray, 473 (1855); *State v. Grand Trunk Ry. Co.*, 60 Me. 145 (1871); *State v. Gilmore*, 24 N. H. 461 (1852). Or the action is brought in the name of the State. *State v. Baltimore &c. R. R. Co.*, Md. ; 17 Atl. Rep. 88 (1889).

²⁶ *Wiltse v. Town of Tilden*, 77 Wis. 152, 156 (1890); *Westcott v. Central Vt. R. R. Co.*, 61 Vt. 438 (1889); *Woodward v. Chicago &c. R. R. Co.*, 23 Wis. 400 (1868). A posthumous child is sufficient a child *en ventre sa mere*. *Nelson v. Galveston &c. Ry. Co.*, 78 Tex. 621 (1890); *Texas &c. Ry. Co. v. Robertson*, 82 id. 657 (1891). But a four or five months' foetus, surviving but a few minutes after delivery, is not a "person" for whose death an action will lie. *Dietrich v. Northampton*, 138 Mass. 14 (1884).

²⁷ The North Carolina statute (Code 1883, § 1504) provides that "all sums of money, or other estate * * * unrecovered or unreclaimed by suit, creditors, next of kin, or others entitled thereto, shall be paid by the executor, administrator, or collector to the trustees of the University of North Carolina" after five years. *Warner v. Western N. Car. R. R. Co.*, 94 No. Car. 250 (1886).

Virginia Code 1887, § 2904, provides, "but if there be no husband or wife, parent or child, the amount received shall be assets in the hands of the personal representative, to be disposed of according to law." *Baltimore &c. R. R. Co. v. Wightman*, 29 Gratt. 431, 439 (1877); *Matthews v. Warner*, 29 id. 570 (1877); *Baltimore &c. R. R. Co. v. Sherman*, 30 id. 602, 607 (1878); *Baltimore &c. R. R. Co. v. Noell*, 32 id. 394, 406 (1879); *Harper v. Norfolk &c. R. R. Co.*, 36 Fed. Rep. 102 (1887).

West Virginia Code, chap. 103, § 6, provides, "and the amount so recovered shall not be subject to any debts or liabilities of the de-

statutes provide that the action shall be for the benefit of the widow *and* next of kin.²⁸ If the deceased left him surviving either a widow or next of kin, it is sufficient to maintain the action under such statutes.²⁹ The phrase "next of kin" is a comprehensive one. Bouvier, in defining it, says: "This term is used to signify the relations of a party who has died intestate. In general, no one comes within this term who is not included in the provisions of the Statute of Distribution."³⁰ A "bastard" is not sufficient.³¹ It is not necessary that the

ceased." Held, not necessary in the declaration to aver that the decedent left wife, children, or next of kin. *Madden v. Chesapeake &c. Ry. Co.*, 28 W. Va. 610 (1886). The declaration is not demurrable because it names the widow and children. *Searle v. Kanawha &c. Ry. Co.*, 32 W. Va. 370 (1889).

²⁸ *New Jersey: Gen. Stats of N. J.* (vol. 1), p. 1188, § 11.

²⁹ *Haggerty v. Central R. R. Co.*, 2 Vr. 349 (1865); *City of Chicago v. Major*, 18 Ill. 349 (1857); *McMahon v. Mayor &c. New York*, 33 N. Y. 642 (1865).

³⁰ *Steel v. Kurtz*, 28 Ohio St. 191, 196 (1876). See *Murdock v. Ward*, 67 N. Y. 387 (1876); *Keteltas v. Keteltas*, 72 id. 312 (1878). The word "heir" in the Kentucky statute means children, and does not include other relations. *Jordan v. Cincinnati R. R. Co.*, 11 Ky. L. J. 204. So in the Colorado statute the word "heir or heirs" means "child or children," and limits the right of action to lineal descendants. *Hindry v. Holt*, 24 Colo. 464 (1897). Personal representatives mean the executor or administrator and not his next of kin. *Wiltse v. Town of Tilden*, 77 Wis. 152, 156 (1890); *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294 (1865); *Kramer v. Market Street R.*

R. Co., 25 Cal. 434 (1864); *City of Chicago v. Major*, 18 Ill. 349, 358 (1857). "The administrator is a mere trustee, so made by the statute, with power to sue for the benefit of his *cestui que trust*, or the person beneficially interested. He has no right except in virtue of the right of the real party in interest, and if the right of that party is lapsed or lost, so that no recovery can be had upon it, it follows that the action can be no longer maintained." *Woodward v. Chicago &c. Ry. Co.*, 23 Wis. 400, 406 (1868). Husband and wife are not next of kin to each other. *Townsend v. Radcliffe*, 44 Ill. 446 (1867); *Dickins v. New York &c. R. R. Co.*, 23 N. Y. 158, 160 (1861); *Drake v. Gilmore*, 52 N. Y. 389, 393 (1873); *Western Union Tel. Co. v. McGill*, 57 Fed. Rep. 699; *Warren v. Englehart*, 13 Neb. 283 (1882); *Watson v. St. Paul City Ry. Co.*, 70 Minn. 514 (1897). *Contra* in Ohio, *Steele v. Kurtz*, 28 Ohio St. 191 (1876); in Tennessee, *Traf-ford v. Adams Ex. Co.*, 8 Lea, 96 (1881).

A widow is an heir of her deceased husband under Code of Civ. Pro., § 377. *Knott v. McGilvray*, Cal. ; 6 Am. Neg. Rep. 7 (1899).

³¹ A bastard is not a child within section 2 of 9 & 10 Vict., chap. 93.

beneficiaries should be residents of the State or country under whose statute the action is brought or the remedy is sought.³² In New York, it was held that the right of a beneficiary was assignable; that the suit may be prosecuted, notwithstanding such assignment by the sole beneficiary.³³

§ 110. **Distribution.**— All, or nearly all, the statutes which create a right of action for causing the death of a human being provide how the damages, when recovered, shall be distributed. Language common to many of the States is as follows: "And the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate."³⁴ Some of the statutes expressly provide that the fund shall be free from liability for the debts of the deceased.³⁵ In other States:

Dickinson v. Northeastern Ry. Co., 2 Hurl. & C. 735 (1863). Not by mother for the death of her bastard child. *Rev. Stats. Mo.* 1889, § 4425; *Marshall v. Wabash R. R. Co.*, 46 Fed. Rep. 269 (1891). Under the liquor statute giving a right of action to those "dependent." *Good v. Towns*, 56 Vt. 410 (1883). The mother of an illegitimate child cannot maintain an action under a statute giving such right to the "parents," etc., of the deceased. *Harkins v. Philadelphia &c. R. R. Co.*, 15 Phila. 286 (1881, Pa.). *Contra* in Ohio, *Muhl v. Michigan Southern R. R. Co.*, 10 Ohio St. 272 (1859).

³² *Chesapeake &c. R. R. Co. v. Higgins*, 85 Tenn. 620 (1887); *Philpott v. Missouri Pac. Ry. Co.*, 85 Mo. 164 (1884).

³³ A mother assigned her right to the damages for the death of her son. *Quin v. Moore*, 15 N. Y. 432 (1857). See § 97.

³⁴ Ray on Negligence of Imposed Duties, § 182; Arkansas,

Mansf. Dig., § 5226; Illinois, 1 Starr & C. Ann. Stats., chap. 70, § 2; Indiana, *Rev. Stats.* 1881, § 284; Iowa, *McClain's Ann. Code*, § 3731; Kansas, *Gen. Stats.* 1889, par. 4518; Michigan, *How. Stats.*, § 8314; Minnesota, that any demand for the support of the deceased, and funeral expenses, duly allowed by the probate court, shall be first deducted and paid. *Laws* 1891, chap. 123, § 1; Montana, *Comp. Stats.* 1888, p. 911, § 982; Nebraska, *Comp. Laws* 1881, chap. 21, § 2; New Jersey, *Rev.* 1878, p. 294, § 2; *Gen. Stats.* (vol. 1), n. 1188; Oklahoma, *Stats.* 1890, chap. 70, art. 4, par. 4338; Vermont, *Rev. Laws* 1880; West Virginia, *Code*, chap. 103, § 6; Wyoming, *Rev. Stats.* 1887, § 2364b.

³⁵ Alabama, *Code* 1887, § 2589; Arizona, *Rev. Stats.* 1887, § 2149; District of Columbia, *Act of Congress*, Feb. 17, 1885; Georgia, *Code* 1882, § 2971, as amended by *Laws* 1887, No. 588, p. 43; Iowa, *McClain's Ann. Code*, § 3731; Ne-

it is so by judicial construction.³⁶ The damages are no part of the assets of the estate; they are not subject to the payment of the debts of the deceased, nor to the ordinary rules applicable to the settlement and administration of the estates of deceased persons.³⁷

§ 111. There can be but one action and one recovery.— There can be but one action and one recovery for an injury from negligence,³⁸ so that if an injured person recover damages in his lifetime, and then death results from the injury, his personal representatives cannot maintain an action to recover damages for his death.³⁹ The recovery for medical attendance, expenses and loss of service by decedent does not prevent recovery for damages for death.⁴⁰ The fact that the deceased had instituted suit for damages before his death does not bar a suit by his widow and children after his death.⁴¹ In Illinois it was held

vada, Gen. Stats. 1885, § 3899; New Mexico, Comp. Laws 1884, as amended by Laws 1891, chap. 49, § 2310; North Carolina, Code 1883, § 1500; Pennsylvania, 2 Brightly's *Purd. Dig.*, p. 1267, § 4; Tennessee, Mill & V. Code, § 3133; Texas, Sayles' Civil Code, § 2903; Utah, Comp. Laws 1888, § 2962; Virginia, Code 1887, § 2904; West Virginia, Code, chap. 103, § 6; Wisconsin, Rev. Stats. 1878, § 4256; Wyoming, Rev. Stats. 1887, § 2364b.

³⁶ *Haggerty v. Central R. R. Co.*, 2 Vr. 349, 351 (1865). The damages are for the heirs and do not constitute any part of the estate of the deceased. *Munro v. Pacific Coast &c. Co.*, 84 Cal. 515 (1890).

³⁷ *Stuber v. McEntee*, 142 N. Y. 200 (1894); *City of Friend v. Burleigh*, 53 Neb. 674 (1898); *Holton v. Daly*, 106 Ill. 137 (1882). Does not pass by virtue of any provisions of the will of the deceased. *Holton v. Daly*, 106 Ill. 137 (1882).

³⁸ *City of North Vernon v. Voelger*, 103 Ind. 314, 319 (1885).

³⁹ *Littlewood v. Mayor &c. New York*, 89 N. Y. 24 (1882), overruling *Schlichting v. Wintgen*, 25 Hun, 626. The statute was not intended to impose a double liability, but simply to give a right of action when a party, having a good cause of action for a personal injury, was prevented, by death resulting from such injury, from enforcing his right, or who omitted in his lifetime so to do. The legislature has the power to create such double liability. *Ib.*; *Read v. Great Eastern Ry. Co.*, L. R., 3 Q. B. 555 (1868).

⁴⁰ *Barley v. Chicago &c. R. R. Co.*, 4 Biss. 430 (1865).

⁴¹ *International &c. R. R. Co. v. Kuehn*, 70 Tex. 582 (1888); *Indianapolis &c. R. R. Co. v. Stout*, 53 Ind. 143 (1876). But where the injured person began a suit in his lifetime, which his administrator prosecuted to judgment after his

that where the plaintiff, pending an action brought by him to recover for a personal injury resulting from negligence, dies from some other cause than such injury, the action will survive and may be prosecuted in the name of the administrator.⁴² Under the Massachusetts Employers' Liability Act (Laws of 1887, chap. 270, § 1, cl. 3, and § 3), an administrator may not recover on account of the death of the intestate in addition to his right as legal representative; damages accruing to the intestate in his lifetime.⁴³ But in another case it was held that the administrator of a person injured by a defect in a highway, who after an interval dies of his injuries, may maintain an action, under the Public Statutes, chapter 52, section 17, to recover for the injuries for the benefit of the estate, and at the same time a second action, under section 18, for the loss of life for the benefit of the widow or children or next of kin to the deceased.⁴⁴ Mr. Tiffany, in his book on Death by Wrongful Act,⁴⁵ says: "Whether the personal representative would be permitted to maintain both the action which survives by statute and the action for death, is not entirely clear." They are separate and distinct causes of action.⁴⁶ One is not a bar to the other.⁴⁷ A suit as administratrix for the death of her husband is not a bar to a suit as administratrix to recover damages for injuries to personal chattels of the intestate.⁴⁸ A father may maintain an action for the death of his child, under Code 1881, section 9, although the administrator of the child's estate may have, theretofore, recovered judgment against the same defendant for causing the child's death by wrongful act

death, such judgment will bar a ⁴⁵ § 127.

second suit for the benefit of the ⁴⁶ Hurst v. Detroit City Ry. Co.,
widow, although the damages 84 Mich. 539 (1891). See Sweet-
awarded in the first suit were land v. Chicago &c. Ry. Co.,
solely for the injuries to the de- Mich. ; 43 L. R. A. 568 (1898).
ceased person in his lifetime. Legg ⁴⁷ Leggott v. Great Northern Ry.
v. Britton, 64 Vt. 652 (1890). Co., L. R., 1 Q. B. D. 599 (1876).

⁴² Chicago &c. R. R. Co. v. See Legg v. Britton, 64 Vt. 652
O'Connor, 119 Ill. 586 (1886); Hol- (1890); Brown v. Chicago &c. Ry.
ton v. Daly, 106 Ill. 136 (1882). Co., Wis. (1898); 5 Am. Neg.

⁴³ Ramsdell v. New York &c. R. Rep. 255.

R. Co., 151 Mass. 245 (1890). ⁴⁸ Barnett v. Lucas, 6 Ir. C. L.

⁴⁴ Bowes v. City of Boston, 155 247 (1872).
Mass. 344 (1892).

or neglect.⁴⁹ In Kentucky, it was held that a recovery by a husband as personal representative, under section 1 of chapter 57, General Statutes, for the killing of his wife by the negligence of a railroad company is a bar to an action by him as husband to recover damages for the loss of the wife's society from the time of the injury until her death, for which the common law gave a right of action.⁵⁰ In California, under Code of Civil Procedure, section 377, it was held that separate actions could not be brought by the executor and by the heirs, and a former recovery by an executor may be pleaded and proved in bar to an action subsequently brought by the heirs.⁵¹ So an action by the heirs is a bar to an action by the personal representatives of the deceased.⁵² Lord Campbell's Act provides, "that not more than one action shall lie for and in respect of the same subject-matter of complaint."⁵³ Two distinct

⁴⁹ *Hendrick v. Ilwaco Ry. &c. Co.*, 4 Wash. St. 400 (1892). Action by administrator does not bar action by father. *Id.*; *Davis v. St. Louis &c. Ry. Co.*, 53 Ark. 117 (1890); *Putman v. Southern Pacific Co.*, 21 Or. 230 (1891).

⁵⁰ *Louisville &c. R. R. Co. v. McElwain*, 98 Ky. 700 (1896). See *Holton v. Daly*, 106 Ill. 131 (1882); *Hulbert v. City of Topeka*, 34 Fed. Rep. 510 (1888); *Lubrano v. Atlantic Mills*, 32 Atl. Rep. 205 (R. I. 1895); *Sweetland v. Chicago &c. Ry. Co.*, Mich. ; 43 L. R. A. 568 (1898). In that case this subject is reviewed by Long, Ch. J., and Judges Montgomery and Hooker. See 28 Am. L. Reg. (N. S.) 528, 576.

⁵¹ *Hartigan v. Southern Pacific Co.*, 86 Cal. 142 (1890).

⁵² *Munro v. Pacific Coast &c. Co.*, 84 Cal. 515 (1890). So under the Texas statute, successive suits are negatived. *Houston &c. Ry. Co. v. Moore*, 49 Tex. 31 (1878). See *Hendrick v. Ilwaco Ry. &c. Co.*, 4 Wash. St. 400 (1892); *Put-*

man v. Southern Pac. Co., 21 Or. 230 (1891); *Mayhew v. Burns*, 103 Ind. 328 (1885).

⁵³ England: 9 & 10 Vict., chap. 93, § 3.

New Brunswick: Consol. Stats., chap. 86, § 5.

Nova Scotia: Rev. Stats. 1884, chap. 116, § 3.

Ontario: Rev. Stats. 1887, chap. 135, § 5.

Quebec: Civil Code, L. Can., art. 1056.

Alabama: Code 1887, § 2588.

"When the death of a minor child is caused by negligence * * * a suit by the father or mother is a bar to a suit by the personal representatives."

District of Columbia: Act of Congress, Feb. 17, 1885, 23 Stats., p. 307. "That no action shall be maintained under this act in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party."

Maryland: Pub. Gen. Laws, art.

injuries may be inflicted from the same wrongful act, thereby giving rise at common law to two separate actions. Thus, for a tort committed upon a wife, child or servant, two actions will lie for the same wrongful act.⁵⁴ A recovery by the wife, child or servant in their right for their injuries is not a bar or answer to an action brought by the husband, parent or master for damages to them caused by the same negligent act.⁵⁵

67, § 2, the same as the English act.

South Carolina: Gen. Stats. 1882, § 2186. "The provisions of the three preceding sections of this chapter shall not apply to any case where the person injured has, for such injury, brought action, which has proceeded to trial and final judgment before his or her death."

Tennessee: Mill & V. Code, § 3133. "If the deceased had com-

menced an action before his death, it shall proceed without a revivor."

⁵⁴ See §§ 113, 117, 120.

⁵⁵ *Town of Newbury v. Connecticut &c. R. R. Co.*, 25 Vt. 377 (1853); *Meese v. Fond du Lac*, 48 Wis. 323, 328 (1879); *Hendrick v. Ilwaco Ry. &c. Co.*, 4 Wash. St. 400 (1892); *Brown v. Chicago &c. Ry. Co.*, Wis. (1898); 5 Am. Neg. Rep. 255; *Dicey on Parties to Actions*, p. 327.

CHAPTER IV.

PARTIES PLAINTIFF.

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| <p>§ 112. Parties plaintiff in general.</p> <p>113. Husband and wife —
Joined as parties — Adding claims by husband.</p> <p>114. Husband and wife — Death of wife or husband.</p> <p>115. Husband and wife — Divorce.</p> <p>116. Husband and wife—American statutes.</p> <p>117. Master and servant.</p> <p>118. Infants — American statutes.</p> <p>119. Infants — American statutes — Continued.</p> <p>120. Infants — Injury to — Parents' right of action.</p> | <p>§ 121. Insane persons — Idiots and lunatics.</p> <p>122. Partners.</p> <p>123. Bankrupts.</p> <p>124. Stockholders in corporations—Travellers on highways.</p> <p>25. Action for causing death of a human being.</p> <p>126. Where action is brought under a foreign statute.</p> <p>127. Foreign executors or administrators.</p> <p>128. Assignment of action for personal injuries.</p> <p>129. Survival of action for personal injuries — Statutes.</p> |
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§ 112. Parties plaintiff in general.— In an action brought to recover damages for injuries to the person, caused by negligence, the proper party in general is, as plaintiff, the person who has sustained the injury, and, as defendant, the person or corporation legally responsible for causing the injury. First, as to the plaintiff, the rule of law has been stated thus: The person who sustains an injury is the person to bring an action for the injury against the wrongdoer.¹ But when the person injured stands in a legal relation to some other person, such as husband and wife, or is under a legal disability, such as minors, lunatics or idiots, or the injury results in death, for which an action will lie only by virtue of the statutes providing for such an action, other rules of law must be invoked and statutes consulted to ascertain in such cases who is the proper party plaintiff to the action. It may be that the person injured stands in such a legal relation to the person or

¹ Dicey on Parties to Actions, p. 330, Rule 79; Shearm. & Redf. on Neg. (5th ed.), § 115 *et seq.*

corporation causing the injury that an action cannot be maintained against the wrongdoer, such as husband and wife, or public officials, although it has been held that a police officer² and fireman³ have no such relation by virtue of their employment to the city, whose officers they are, as would prevent their maintaining an action to recover damages sustained by reason of defective highways therein, otherwise with a road surveyor.⁴ In section 90 it was stated that when a passenger has been injured by the negligence of a common carrier, it is at the election of the plaintiff to declare in *assumpsit* and rely on the contract, or to declare in tort and rest on the breach of duty. The rules of law in reference to parties are materially different in the two classes of cases.⁵ If the action is in contract, no one who is not a party to the contract can maintain a suit for its breach.⁶

§ 113. Husband and wife — Joined as parties — Adding claims by husband.— At common law the husband and wife must sue jointly in an action brought to recover damages for injuries to the person of the wife, committed either before marriage or during coverture, or for injuries to a third person, for which the wife must sue as executor or administrator.⁷

² Kimball v. City of Boston, 1 Allen, 417 (1861).

³ Palmer v. City of Portsmouth, 43 N. H. 265 (1861).

⁴ Todd v. Inhabitants of Rowley, 8 Allen, 51 (1864).

⁵ Dicey on Parties, p. 369 *et seq.*

⁶ § 90; Bricker v. Philadelphia &c. R. R. Co., 132 Pa. St. 1 (1890).

⁷ Dicey on Parties to Actions, p. 388, Rule 86. See Schouler on Husband and Wife, §§ 133 *et seq.*, 141; Long v. Morrison, 14 Ind. 595 (1860); Pennsylvania R. R. Co. v. Goodenough, 26 Vr. 577, 587 (1893). This is so in the following States, except as stated in note to § 116.

Alabama: Code of Alabama (vol. 1) 1886, § 2577.

Arizona: Rev. Stats. of Arizona 1887, § 683.

California: See McKune v. Santa Clara &c. Co., 110 Cal. 480 (1895).

Connecticut: Gen. Stats. of Conn. 1888, pp. 234, 238, §§ 987, 1004.

Idaho: Rev. Stats. of Idaho 1887, p. 441, § 4093.

Louisiana: Garland's Rev. Code of Practice 1894, p. 108.

Maine: Rev. Stats. of Me. 1883, p. 699, § 37.

Maryland: Pub. Gen. Laws of Md. 1888, p. 802, § 4.

Michigan: Compiled Laws of Mich. 1871, p. 1689, § 5841.

Missouri: "A married woman may, in her own name, with or without joining her husband as a party, sue or be sued," etc. Rev. Stats. of Mo. 1889, p. 527, § 1996.

Nevada: Gen. Stats. of Nev. 1885, § 3029.

This results from the common-law disability of the wife during coverture to maintain a suit at law. In England, by the Common Law Procedure Act 1852, section 40, it shall be lawful for the husband to add thereto claims in his own right arising *ex delicto*. This statute has been copied in some of the States, the practice of which is according to the common law.⁸ The

New Jersey: Pennsylvania R. R. Co. v. Goodenough, 26 Vr. 577, 587 (1893); Klein v. Jewett, 11 C. E. Gr. 474 (1875). "Any married woman living separate from her husband may bring suit in her own name for the recovery of damages for any injury done to her person or reputation." Rev. of N. J. 1877, p. 851, § 24; Gen. Stats. (vol. 2), p. 2536.

North Carolina: Code of North Carolina 1883, § 178.

Rhode Island: Pub. Stats. of R. I. 1882, pp. 420, 424, 425.

South Carolina: Rev. Stats. of So. Car. 1893 (vol. 2), § 135.

Utah: Comp. Laws of Utah 1888, § 3172.

Washington: Hill's Ann. Stats. & Codes of Wash. 1891 (vol. 2), § 137. Husband and wife may, or she may sue alone. Phelps v. SS. City of Panama, 1 Wash. Ter. 318 (1877).

West Virginia: Code of W. Va. 1891, chap. 66, p. 623, § 15.

Wisconsin: Sanborne & Berryman's Ann. Stats. 1889, § 2608; Gibson v. Gibson, 43 Wis. 23 (1877).

8 "In any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as coplaintiff, the husband may add thereto claims in his own right; and separate actions brought in respect to such claims may be consolidated, if the court or a judge shall think fit; provided, that in the case of the death of either plaintiff, such suit, so far only as

relates to the causes of action, if any, which do not survive shall abate." Common Law Procedure Act 1852, § 40. This section is not imperative, it is permissive only. Dicey on Parties to Actions, p. 391; Brockbank v. Whitehaven Junction Ry. Co., 7 H. & N. 834 (1862).

In New Jersey the statute is that, "in any action by a husband and his wife for an injury done to the wife, in respect of which she is necessarily joined as coplaintiff, it shall be lawful for the husband to add thereto claims in his own right arising *ex delicto*, and separate actions brought in respect to such claims may, by order of the court, or a judge, be consolidated; provided, that in case of the death of either plaintiff, such suit shall abate only so far as relates to the cause or causes of action, if any, which do not survive." Rev. of N. J. 1877, p. 851, § 22; Gen. Stats. of N. J. (vol. 2), p. 2536. § 22. A married woman can recover damages only for her personal injury and suffering. The loss of income from her incapacity, and the expenses of her cure, must be recovered by her husband. Klein v. Jewett, 11 C. E. Gr. 474 (1875).

Connecticut: Gen. Stats. of Conn. 1888, p. 239, § 1007.

Wisconsin: § 2680, R. S. 1878, chap. 96, Laws 1873.

Pennsylvania: See Rockwell v. Waverly & c. Traction Co., 187 Pa. St. 568 (1898).

better practice is for the husband to present his claim by a separate count, designating the damages sought by him. The verdict should assess the damages on each claim, and the judgment should distinguish them accordingly.⁹ For a tort committed upon a wife, two actions will lie, as a general rule; one by the husband alone, for the loss of service, expenses, etc., and the other by the husband and wife for the injury to the person of the wife.¹⁰ An action brought by the husband for injuries to himself is no bar to a subsequent action by him for injuries to his wife, occurring at the same time;¹¹ but he may recover in the same action for the injury done to himself and for that which he has sustained by the injury to his wife.¹² In California, where the husband has a separate cause of action for consequential damages to him for his wife's injuries, the wife is neither a necessary nor a proper party. The two causes of action cannot be properly joined.¹³ In some of the States where the husband is a proper or necessary party to the action of his wife to recover damages for a personal injury to her, and the marriage has taken place since the action was commenced, it is provided that such action shall not abate on account of such marriage; but the marriage may be suggested on the record and the suit shall then proceed as if the action had been commenced after such marriage.¹⁴ The wife's cause of action to

⁹ Consolidated Traction Co. v. Whelan, 31 Vr. 154 (1897). Code as amended 1893, p. 794, § 24.

¹⁰ Rogers v. Smith, 17 Ind. 323 (1861); Hawkins v. Front Street Cable Ry. Co., 3 Wash. St. 592 (1892); Rockwell v. Waverly &c. Traction Co., 187 Pa. St. 568 (1898). Florida: McClellan's Dig., R. 8. 1892, p. 362, § 996.

¹¹ Town of Newbury v. Connecticut &c. R. R. Co., 25 Vt. 377 (1853). Georgia: Code of Ga. 1883, p. 867, § 3433.

¹² Cincinnati &c. R. R. Co. v. Chester, 57 Ind. 297 (1877); Rockwell v. Waverly &c. Traction Co., 187 Pa. St. 568 (1898). Maine: Rev. Stats. of Me. 1883, p. 699, § 37.

¹³ McKune v. Santa Clara &c. Co., 110 Cal. 480 (1895). Massachusetts: If marriage is before final judgment she may continue to prosecute the suit as if she were a *feme sole*. Pub. Stats. of Mass. 1882, p. 960, § 24.

¹⁴ Alabama: Code of Ala. 1886 (vol. 1), § 2602. Michigan: Comp. Laws of Mich. 1871, p. 1689, § 5841.

Missouri: Rev. Stats. of Mo. 1889, p. 569, § 2196.

Nebraska: Comp. Stats. of Neb. 1893, p. 858, § 45.

Nevada: Gen. Stats. of Nev. Conn. 1888, p. 238, § 1004. Delaware: Laws of Del., Rev. 1885, § 3038.

recover those elements of damage for which she can recover, such as personal injury and suffering,¹⁵ should not be confounded with the husband's right of action flowing from the same negligent act for which he has a right of action, such as the loss of income from her incapacity, as well as the expenses of her cure.¹⁶ The negligent act complained of may inflict an injury to the person of the wife and thereby cause a legal injury to the husband.

§ 114. Husband and wife — Death of wife or husband.—

At common law the death of the wife pending the suit for her personal tort put an end to the action altogether.¹⁷ In case the husband dies, the right of action remains in the wife, and she is the proper party to sue for the injury; on the death of the wife the right of action, if it is one which survives or continues, passes to her representatives.¹⁸

New Jersey: Rev. of N. J., p. 55 Mo. 456 (1874); 17 Am. Rep. 851, § 23 (1877); Gen. Stats. of N. J. 660; *Mewhirter v. Hatten*, 42 (vol. 2), p. 2536, § 23. Iowa, 288 (1875); 20 Am. Rep. 618.

North Carolina: Code of No. 16 *Klein v. Jewett*, 11 C. E. Gr. 480 (1875); affirmed, 12 id. 550.

Ohio: Rev. Stats. of Ohio 1894, § 5012. 17 *Bac. Abr. Baron & Feme, K.*; *Meese v. Fond du Lac*, 48 Wis. 323, 328 (1879). In that case the question is raised, though not decided, whether, under the Wisconsin statute, a judgment in a joint action by the husband and wife, to recover damages for her personal injuries only, would be a bar to a subsequent action by the husband for loss of service, etc., arising out of the same negligence or default of the defendant, or whether the actual pendency of such joint action would be a good plea in abatement to such subsequent separate action by the husband. See § 129, "Survival of Action."

South Carolina: Rev. Stats. of So. Car. 1893, § 142.

Tennessee: Code of Tenn. 1884, §§ 3559, 3571.

Texas: Rev. Stats., art. 1252. On the marriage of a widow pending a suit for her son's death, the husband should be made a party. *San Antonio Street Ry. Co. v. Cailloutte*, 79 Tex. 341 (1891).

Vermont: Gen. Stats. of Vt. 1870, p. 470, § 8.

Washington: Hill's Ann. Stats. & Codes of Wash. 1891, § 147.

Wyoming: Rev. Stats. of Wyo. 1887, § 2401.

¹⁵ *Klein v. Jewett*, 11 C. E. Gr. 474, 480 (1875); affirmed, 12 id. 550; *Smith v. City of St. Joseph*, p. 392.

¹⁸ *Dacey on Parties to Actions*, p. 392.

§ 115. **Husband and wife — Divorce.**— A divorce severs the relationship of husband and wife and leaves the wife free to sue in her own name for an injury to her person received after the divorce has been granted. She can also maintain a suit in her own name for an injury to her person inflicted prior to the granting of the divorce.¹⁹

§ 116. **Husband and wife — American statutes.**— In some of the States which have adopted a Code of Civil Procedure, or have modified the common-law procedure by statute, sometimes called the Practice Act, the rule of the common law has been changed, so as to permit the wife to bring a suit in her own name to recover damages to her person without joining the husband therein as a party plaintiff,²⁰ or by permitting the wife

¹⁹ *City of Peru v. French*, 55 Ill. 317 (1870).

²⁰ This is so in

Arkansas: Dig. of Stats. of Ark. 1894, § 5641. See *id.*, § 6351; *St. Louis & C. Ry. Co. v. Amos*, 54 Ark. 159 (1891).

Colorado: Rice's Colo. Code of Pro. 1870, § 6.

Delaware: Laws of Del., Rev. Code as amended 1893, p. 600, § 1.

Illinois: Starr & Curtiss' Ann. Stats. 1885, chap. 68, par. 1, p. 1269.

Indiana: Acts March 25, 1879, p. 160; R. S. 1881, § 5131; *Barnett v. Leonard*, 66 Ind. 422 (1879); *Hamm v. Romaine*, 98 id. 77 (1884). For the rule at common law and under the early Code of Indiana, see *Long v. Morrison*, 14 Ind. 595 (1860).

Iowa: Miller's Rev. Code of Iowa 1888, p. 886, § 2562.

Kansas: Gen. Stats. 1889 (vol. 2), p. 1191, § 4106.

Kentucky: The Ky. Stats. 1894, p. 775, § 2128.

Massachusetts: Pub. Stats. of Mass. 1882, p. 819, § 7.

Minnesota: Stats. of Minn. 1894,

§ 5159. The joining of the husband is an irregularity only. *Colvill v. Langden*, 22 Minn. 565 (1876).

Mississippi: Ann. Code of Miss. 1892, § 2289. "A married woman may, in her own name, with or without joining her husband as a party, sue and be sued."

Missouri: Rev. Stats. of Mo. 1889, p. 527, § 1996.

Montana: Comp. Stats. of Mont. 1887, § 7.

New York: Rev. Stats., Codes & Laws of N. Y., p. 2153, § 5; chap. 248, P. L. 1890, p. 464.

Ohio: Rev. Stats. of Ohio 1894, § 4996.

Oklahoma: Stats. of Okla. 1893, § 2978.

Oregon: Hill's Ann. Laws of Or. 1892, p. 153, § 30.

Pennsylvania: Brightly's Purd. Dig. 1894, p. 1303, § 52.

Washington: Hill's Ann. Stats. & Codes of Wash. 1891, § 137.

Husband and wife may join in the action for an injury to the wife or the wife may sue alone. *Phelps v. SS. City of Panama*, 1 Wash. Ter. 518 (1877); *Hawkins v.*

to sue alone under certain circumstances, such as when she may be living separate and apart from her husband during coverture; or when the husband is under some legal disability, such as being imprisoned for a crime or is insane.²¹ The several statutes of the different States are dissimilar in detail, so that each statute will have to be consulted for the rule of law in any given jurisdiction.

§ 117. **Master and servant.**— The relation of master and servant, principal and agent, employer and employe, is not such a legal relation as permits one or the other to bring a suit for an injury to the person of the other. Each must sue as a party plaintiff in his own name for the injury to the person of himself or herself. The master may maintain an action to recover compensation for a tort to his servant which deprives the master of the labor and services of his servant, *per quod servitium amisit*.²² The question has been mooted whether a joint action could be maintained by the master and servant against the wrongdoer. It is believed that there is no reported case which sanctions such a joint action. It is questionable whether such an action would lie.

Front Street Cable Ry. Co., 3 Wash. St. 592 (1892).

Wyoming: Rev. Stats. of Wyo. 1887, § 2385.

²¹ This is so in

Alabama: Code of Ala. (vol. 1) 1886, § 2578.

California: Deering's Ann. Codes & Stats. 1885, § 370.

Georgia: Code of Ga. 1883, p. 408, § 1774.

Idaho: Rev. Stats. of Idaho 1887, p. 441, § 4093.

Nevada: Gen. Stats. of Nev. 1885, § 523.

New Jersey: Rev. of N. J. 1877, p. 851, § 24; Gen. Stats. of N. J. (vol. 2), p. 2536, § 24.

Rhode Island: Pub. Stats. of R. I. 1882, pp. 420, 424, 425.

Tennessee: Code of Tenn. 1884, § 3505.

Utah: Comp. Laws of Utah 1888, § 3172.

Vermont: Gen. Stats. of Vt. 1870, p. 471, § 13.

West Virginia: Code of W. Va. 1891, chap. 66, p. 623, § 15. And if she be an infant plaintiff she must prosecute by next friend, and if she be defendant she must defend by guardian *ad litem*.

²² "A master often brings an action for what is called an injury to his servant. In strictness, however, the master sues, not for the injury to his servant, but for the injury to himself resulting from damage to his servant." Dicey on Parties to Actions, p. 326; Ames v. Union Ry. Co., 117 Mass. 541, 543 (1875); Fairmount &c. Ry. Co. v. Stutler, 54 Pa. St. 375 (1867).

§ 118. **Infants — American statutes.**— For an injury to the person of an infant the suit must be brought in the name of the infant²³ by a guardian or *prochein ami*, i. e., a next friend,²⁴ so called. The infant cannot prosecute an action either in person or by an attorney, as the infant is not presumed to be of sufficient discretion to choose an attorney.²⁵ In England, the infant was required to appear and prosecute by guardian until the statute of Westminster 1, chap. 48, which allowed an infant to prosecute an action by *prochein ami* in an assize court; and by statute of Westminster 2, chap. 15, in all other courts. In some of the United States it has been provided by statute that a suit in which the infant is the meritorious cause of action, must be brought in the infant's name by the infant's general guardian or by a guardian *ad litem* appointed by the court in which the action is pending, or

²³ Spooner v. Delaware &c. R. R. Co., 115 N. Y. 22, 28 (1889).

²⁴ 2 Thomp. on Neg., p. 1242; Hartfield v. Roper, 21 Wend. 615 (1839).

²⁵ Bartholomew v. Dighton, Cro. Eliz. 424; Miles v. Boyden, 3 Pick. 213 (1825); Co. Lit. 135b, note 220; Rue v. Meirs, 16 Stew. 379 (1887). It is not necessary to the institution or prosecution of a suit by *prochein ami*, that the infant should have authorized or consented to the action. McCarrick v. Kealy, 70 Conn. 642 (1898).

²⁶ Alabama: Infants must sue by next friend. Code of Ala. (vol. 1) 1886, § 2579; Cook v. Adams, 27 Ala. 294 (1855).

Arizona: Guardian. Rev. Stats. of Ariz. 1887, § 1342.

Arkansas: Dig. of Stats. of Ark. 1894, § 5645. "Any person may bring the action of an infant as his next friend, but the court has power to dismiss it if it is not for the benefit of the infant, or to substitute the guardian of the infant, or another person, as the next friend." An attorney *ad litem*

should not be appointed for an infant, but a guardian *ad litem*. Hedges v. Frazier, 31 Ark. 58 (1876); Williams v. Ewing, id. 229 (1876).

California: Must appear either by his general guardian or by a guardian *ad litem*. Deering's Ann. Codes & Stats. 1885, § 372.

Colorado: He shall appear by next friend of his own selection or by a guardian. Rice's Colo. Code of Pro. 1890, § 7.

Connecticut: Under the Connecticut practice no previous appointment by the court is required. McCarrick v. Kealy, 70 Conn. 642, 646 (1898).

Delaware: By guardian or next friend. Laws of Del., Rev. Code as amended 1893, p. 794, § 29.

Florida: By their next friends in all cases whatsoever. Rev. Stats. of Fla. 1892, p. 357, § 982.

Georgia: By guardian or next friend. Code of Ga. 1883, p. 820, § 3263. Suit commenced by infant alone is not void. Sims v. Dorsey, 61 Ga. 488 (1878).

Idaho: By general guardian or

by the infant's next friend, or *prochein ami*, appointed by the court for that purpose.²⁶ A father has the first and

guardian *ad litem*. Rev. Stats. of Idaho 1887, § 4095.

Illinois: By guardian or next friend. Starr & Curtiss' Ann. Stats. 1885, p. 393, par. 5, § 5, chap. 22.

Indiana: A competent and responsible person shall consent in writing to appear as the next friend of an infant. Ann. Stats. of Ind. 1894, p. 78, § 257.

Iowa: By the guardian or next friend. Miller's Rev. Code of Iowa 1888, p. 887, § 2565.

Kansas: By guardian or next friend. Gen. Stats. 1889 (vol. 2), § 4108.

Kentucky: By guardians. The Ky. Stats. 1894, p. 744, § 2030.

Louisiana: "Through the intervention or with the assistance of their tutors or curators." Garland's Rev. Code of Practice 1894, p. 108, § 108.

Maine: Guardian *ad litem* or next friend. Rev. Stats. of Me. 1883, p. 565, § 28.

Massachusetts: Guardian or next friend. Pub. Stats. of Mass. 1882, p. 789, § 43.

Maryland: By guardian or *prochein ami*, subject to the order of the court. Pub. Gen. Laws of Md. 1888, p. 173, § 125. A formal order of admission by the court not necessary. Deford v. State, 30 Md. 179 (1868).

Michigan: Next friend. Comp. Laws of Mich. 1871, p. 1835, § 6531.

Minnesota: Guardian or next friend. Stats. of Minn. 1894, § 5160. In the name of the infant by his guardian or next friend. Perine v. Grand Lodge A. O. U. W., 48 Minn. 82 (1892).

Missouri: By the guardian or curator or by a next friend appointed for him. Rev. Stats. of Mo. 1889, p. 528, § 1997.

Montana: By guardian. Comp. Stats. of Mont. 1887, § 9.

Nebraska: By guardian or next friend. Comp. Stats. of Neb. 1893, p. 857, § 36.

Nevada: Guardian *pendente lite* or next friend. Gen. Stats. of Nev. 1885, §§ 559, 3031.

New Hampshire: By a guardian. Pub. Stats. of N.H. 1891, p. 501, § 1.

New Jersey: By guardian or next friend. Rev. of N. J. 1877, p. 850, § 18; Gen. Stats. of N. J. (vol. 2), p. 2536. To take advantage of the infancy of a plaintiff, suing alone, is by a plea in abatement. Smith v. Van Houten, 4 Halst. 381 (1828). A father has the first and best right to act as the next friend of his infant child, in any litigation necessary for the protection of his child's rights. Rue v. Meirs, 16 Stew. 377 (1887).

New Mexico: By father, mother, guardian or next friend. Comp. Laws of N. Mex. 1884, § 2335.

New York: By a guardian, in the name of the infant. Birdseye's Rev. Stats., Codes & Laws N. Y. 1889 (vol. 2), p. 2155, § 24. The omission to appoint a guardian *ad litem* for an infant plaintiff before the trying of an action is not a jurisdictional defect, but is an irregularity merely. Riwa v. The Rossie Iron Works, 120 N. Y. 433 (1890).

North Carolina: By general or testamentary guardians; if none, may appear by next friend. The Code of No. Car. 1883, § 180.

best right to act as the next friend of his infant child in any litigation for the protection of his child's rights.²⁷

§ 119. **Infants — American statutes — Continued.**—In some of the States, by statute, an action is given to the father. In case of his death, or desertion of his family, the mother may sue for the death or injury to a minor child. A guardian, for the injury or death of his ward. The Alabama statute is: "A father, or in case of his death, or desertion of his family, or of his imprisonment for a term of two years or more, under a conviction for crime, or of his confinement in an insane asylum, or if he has been declared of unsound mind, the mother, may sue for an injury to a minor child, a member of the family."²⁸ In those States where such statutes exist the proper and only

Ohio: By guardian or next guardian *ad litem*. Comp. Laws of friend. Rev. Stats. of Ohio 1894, Utah 1888, § 3174. § 4998.

Oklahoma: Guardian must be appointed to conduct the civil suits of minors. Stats. of Okla. 1893, § 3613. Vermont: By guardian *ad litem* or next friend. Gen. Stats. of Vt. 1870, p. 476, § 10.

Ontario: Official guardian *ad litem* for infants. Rev. Stats. of Ontario 1887, p. 484, § 131. Virginia: By next friend. Code of Va. 1887, § 3614.

Oregon: By guardian. Hill's Ann. Laws of Or. 1892, p. 156, § 32. Washington: By guardian. Hill's Ann. Stats. & Codes of Wash. 1891 (vol. 2), § 142. West Virginia: By next friend. Code of W. Va. 1891, chap. 82, p. 675, § 14. Married woman, infant, living separate from husband, by next friend. Id., p. 623, § 15.

Pennsylvania: Guardian *ad litem* may be appointed for infants. Brightly's Purd. Dig. 1894, p. 1629, § 32. Wisconsin: By guardian. Sanborn & Berryman's Ann. Stats. 1889, § 2613. There is no impropriety in appointing the general guardian, guardian *ad litem*.

Rhode Island: By guardian. Pub. Stats. of R. I. 1882, p. 430, § 2. Straka v. Lander, 60 Wis. 115 (1884).

South Carolina: By guardian. Rev. Stats. of So. Car. 1893 (vol. 2), § 136. Tennessee: By guardian *ad litem*. Code of Tenn. 1884, § 4874. "An action for the injury to a child shall be brought in the name of the child itself." Id., § 3504. Wyoming: By guardian or next friend. Rev. Stats. of Wyo. 1887, § 2387. See Tyler on Inf. & Cov., § 136.

Texas: By guardian or next friend. Sup. to Sayles' Texas Civ. Stat., art. 1211a. ²⁷ Rue v. Meirs, 16 Stew. 377 (1887, N. J.)

Utah: By general guardian or § 443. ²⁸ Code of Ala. (vol. 1) 1886, § 2587; Atkinson Compilation 1890,

parties plaintiffs are those designated in the statute. The statute most generally enacted is: "A father, or in case of his death, or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward."²⁹

§ 120. **Infants, injury to — Parent's right of action.**—At common law the parent may also have a right of action growing out of the injury inflicted upon the infant for the loss of service

²⁹ Arizona. Rev. Stats. of Ariz. 1887, § 686.

Colorado: Rice's Colo. Code of Pro. 1890, § 9.

Indiana: Rev. Stats. 1881, § 266.

Iowa: McClain's Ann. Code, § 3761.

Minnesota: Stats. of Minn. 1894, § 5164.

Montana: Comp. Stats. of Mont. 1888, p. 62, § 13.

Nevada: Gen. Stats. of Nev. 1885, § 3033; Record v. Central Pacific R. R. Co., 15 Nev. 167 (1880).

Oregon: Hill's Ann. Laws of Or. 1892, p. 158, § 34.

Washington: Hill's Ann. Stats. & Codes of Wash. 1891, § 139. In the California and Idaho statutes the words "minor child" are used, and "when such injury or death is caused by the wrongful act or neglect of another" is added. Deering's Ann. Codes & Stats. of Cal. 1885, § 376. See *Kramer v. Market Street R. R. Co.*, 25 Cal. 434 (1864); Rev. Stats. of Idaho 1887, p. 442, § 4099.

The Arkansas statute provides, "that when any person shall be wounded by a railroad train running in this State, he may sue for damages in his own name, or if he be a minor, his father," etc. Dig. of Stats. of Ark. 1894, § 6351.

Two causes of action accrue in case of injury to a minor, one to the parent for the loss he suffers, and one to the minor for his personal injuries. *Sibley v. Ratliffe*, 50 Ark. 477 (1888).

To the Utah statute is added, "such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person." Comp. Laws of Utah 1888, § 3178.

The Indiana statute, "imprisonment" of the father is added. Ann. Stats. of Indiana 1894, p. 81, § 267.

The Iowa statute substitutes, "may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child." Miller's Rev. Code of Iowa 1888, p. 885, § 2556.

The Tennessee statute substitutes, "may maintain an action for the expenses and the actual loss of service resulting from an injury to a minor child, in the parent's service or living in the family." Code of Tenn. 1884, § 3503. "An action for the injury to the child shall be brought in the name of the child itself." *Id.*, § 3504.

per quod servitium amisit, which is based upon the relation of master and servant, which, by legal intendment, exists between the parent and child.³⁰ Such suit should be brought in the name of the parent as plaintiff; but when such relation does not actually exist between the parent and child, as for instance, when the parent has relinquished his right to the services of the child, or the child is so young that his services are worthless, the parent cannot maintain such an action,³¹ although it has been held that a parent might recover damages for the prospective value of the services of a young child who was killed.³² In an action by a father, under the statute, to recover damages for the death of his minor child, caused by the negligence of the defendant, he cannot join with it an action by himself to recover for personal injuries received by him, although caused by the same negligent act.³³

³⁰ See § 246; *Oakland Ry. Co. v. Fielding*, 48 Pa. St. 320 (1864); *Karr v. Parks*, 44 Cal. 46 (1872); *Cowden v. Wright*, 24 Wend. 429 (1840); *Miller's Rev. Code of Iowa* 1888, p. 885, § 2556; *Code of Tenn.* 1884, § 3503; *Sibley v. Ratliffe*, 50 Ark. 477 (1888); *Covington Street Ry. Co. v. Packer*, 9 Bush, 455 (1872). "The right of a parent to sue for injuries to his child is the same in principle as that of a master to sue for injuries to his servant. A parent sues not as a parent, but as a master, and the ground of the action is the loss of service. He, therefore, sues for the wrong, not to his child, but to himself; and can recover damages only for the loss of service he has sustained, and not for his wounded feelings. The service is essential." *Dicey on Parties to Actions*, p. 327. As the parent and the child have each a separate right of action, recovery by one is not an answer to an action by the other. *Ib.*

³¹ *Hall v. Hollander*, 7 Dow. & Ry. 133; 4 B. & C. 660 (1825). The child was two years and a half old. *Grinnell v. Wells*, 8 Scott N. R. 741 (1844); *Aberles v. Bransfield*, 19 Kan. 16 (1877); *Hartfield v. Roper*, 21 Wend. 615 (1839).

³² *Franklin v. Southeastern Ry. Co.*, 3 Hurl. & N. 211 (1858); *Drew v. Sixth Avenue R. R. Co.*, 26 N. Y. 49 (1862). "If, however, there is a capacity to serve, very slight evidence is sufficient to support the allegation of service, and an action has been maintained for an injury to the plaintiff's son, though only eight or nine years of age, without proof of actual service, and where a capacity to serve exists, the tendency of the courts is to infer service from residence with the parent without proof of actual service." *Dicey on Parties to Actions*, p. 327; *Hall v. Hollander*, 4 B. & C. 660 (1825); *Smith on Master & Servant* (2d ed.), 97.

³³ *Cincinnati & C. R. R. Co. v. Chester*, 57 Ind. 297 (1877).

§ 121. **Insane persons, idiots and lunatics.**— Insane persons and idiots must sue by guardians. This is so by statute in many of the States.³⁴

§ 122. **Partners.**—One partner can sue another partner for bodily injury unconnected with the partnership,³⁵ in which case the partner injured must bring the suit in his individual name.

§ 123. **Bankrupts.**—The assignee of a bankrupt cannot maintain a suit for a cause of action which is purely and primarily

³⁴ Alabama: "Persons of unsound mind suing for personal injury, not having a guardian appointed in this State, may sue by next friend, and if sued, must be defended by a guardian of the appointment of the court." Code of Ala. 1886, § 2580. See Walker v. Clay, 21 Ala. 797 (1852).

Arizona: Rev. Stats. 1887, § 1337.

Arkansas: "The action of a person judicially found to be of unsound mind must be brought by his guardian, or if he has none, by his next friend." Dig. of Stats. of Ark. 1894, § 5650.

California: "When an insane or incompetent person is a party, he must appear either by his general guardian, or by a guardian *ad litem* appointed by the court in which the action is pending, in each case." Deering's Ann. Codes & Stats. 1885, § 372.

Delaware: By guardian *ad litem* or trustee. Laws of Del., Rev. Code as amended 1893, p. 794, § 30.

Florida: By guardians. Rev. Stats. 1892, p. 357, § 982.

Idaho: Same as California. Rev. Stats. 1887, § 4095.

Iowa: By guardian or next friend. Miller's Rev. Code 1888, p. 888, § 2569.

Louisiana: By "tutors or curators." Garland's Rev. Code of Prac. 1894, p. 108, § 108.

Maine. Guardian *ad litem*. Rev. Stats. 1883, p. 565, § 28; p. 699, § 38.

Massachusetts: Pub. Stats. of Mass. 1882, p. 960, § 25.

Maryland: By guardian, committee, if any, or *prochein ami*. P. G. Laws of Md. 1888, p. 173, § 125.

Michigan: Comp. Laws of Mich. 1871, p. 1689, § 5844.

Missouri: Rev. Stats. 1889, p. 1318, § 5517.

Nevada: Gen. Stats. 1885, § 560.

New Hampshire: Pub. Stats. of N. H. 1891, p. 501, § 1.

North Carolina: By their general or testamentary guardians; if none, by their next friend. Code of No. Car. 1883, § 180.

Ohio: By guardian. Rev. Stats. 1894, § 4998.

Rhode Island: Pub. Stats. 1882, § 7.

Utah: Com. Laws 1888, § 3174.

Vermont: Gen. Stats. 1870, p. 477, § 17.

Wyoming: Rev. Stats. 1887, § 2387.

³⁵ Dicey on Parties to Actions, p. 385.

personal to the bankrupt, such as to recover damages for bodily injury to the bankrupt, as the right to sue remains with the bankrupt.³⁶

§ 124. Stockholders in corporations—Travellers on highways.—

As a corporation can sue one of its own members³⁷ it would seem that there is nothing to prevent a member of the corporation suing the corporation for injuries caused to him by the servants of the corporation, in the course of their employment.³⁸ In general terms it may be said that an action for a personal injury, can be brought against a municipality caused by a defect in a highway, by travellers only.³⁹

§ 125. Action for causing death of a human being.— At common law no action could be maintained for causing the death of a human being;⁴⁰ but by the statute known as Lord Campbell's Act,⁴¹ passed in 1846, a right of action was given when such death was caused by the wrongful act, neglect or default of another. Statutes similar in their general provisions have since that time been passed in all the States. In many of the States additional provisions have been engrafted thereon, giving additional actions for certain specified causes.⁴² The persons who may maintain such actions are

³⁶ Dicey on Parties to Actions, p. 399. Such as the seduction of a servant. *Howard v. Crowther*, 8 M. & W. 604 (1841). See *Rogers v. Spence*, 13 M. & W. 571 (1844).

³⁷ A joint-stock company, incorporated under 19 & 20 Vict., chap. 47. *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87 (1859).

³⁸ Plaintiff was a stockholder in a railroad company, riding by the invitation of the president. *Philadelphia &c. R. R. Co. v. Derby*, 14 How. 468 (U. S. 1852).

³⁹ *Sykes v. Town of Pawlet*, 43 Vt. 446 (1871). Who are travellers within the rule. See *Shearm. & Redf. on Neg.* (5th ed.), § 370.

⁴⁰ See § 98; *Ray on Negligence of Imposed Duties*, § 177.

⁴¹ 9 & 10 Vict., chap. 93.

⁴² Alabama: Code 1887, § 2590, "Employers' Liability Act."

California: Code Civ. Pro. A father or mother may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward.

Georgia: Code 1882, §§ 2971, 3003, 3004, 3005.

Idaho: Rev. Stats. 1887, § 4099.

Illinois: 3 Starr & C. Ann. Stats., chap. 93, § 14.

Kentucky: Gen. Stats., chap. 57, § 1; Gen. Stats., chap. 1, § 6; Gen. Stats., chap. 32, § 1.

Massachusetts: Stats. 1887, chap. 270, as amended by Stats. 1888, chap. 155, and Stats. 1892, chap. 260.

usually designated in the statute; the action being maintained by virtue of the statute, the party or parties plaintiff are those persons who by the statute are authorized to maintain the action. Thus if the statute, as in Lord Campbell's Act, provides that the "action shall be brought by and in the name of the executor or administrator of the person deceased," the executor or administrator is the proper and only party plaintiff.⁴³ On the other hand, if the beneficiaries are, by the statute, authorized to sue, they would be the necessary parties plaintiff and not the executor or administrator.⁴⁴ Some of the statutes provide that the action may be maintained by the "personal representatives"⁴⁵ of the deceased. In this sense "personal

⁴³ Tiffany on Death by Wrongful Act, chap. 6; Thomas on Neg. 491; Ray on Negligence of Imposed Duties, § 177; City of Chicago v. Major, 18 Ill. 349, 358 (1857); Scheffler v. Minneapolis &c. Ry. Co., 32 Minn. 125 (1884); Davis v. St. Louis &c. Ry. Co., 53 Ark. 117 (1890); Kramer v. Market Street R. R. Co., 25 Cal. 434, 436 (1864); Weidner v. Rankin, 26 Ohio St. 522 (1875); Edgar v. Castello, 14 So. Car. 20 (1880); Wilson v. Bumstead, 12 Neb. 1 (1881).

New Brunswick: Cons. Stats., chap. 86, § 2.

Nova Scotia: Rev. Stats. 1884, chap. 116, § 2.

Ontario: Rev. Stats. 1887, chap. 135, § 3.

Maine: Rev. Stats. 1883, chap. 18, § 80. Life lost through defect in highway, "Executors or Administrators."

Massachusetts: Pub. Stats. 1882, chap. 112, § 212.

New York: Ann. Code Civ. Pro. 1888, § 1902.

North Carolina: Code 1883, § 1498, "Executor, Administrator or Collector."

Rhode Island: Pub. Stats., chap. 204, § 18; Goodwin v. Nickerson, 17 R. I. 478 (1891).

South Carolina: Gen. Stats. 1882, § 2184.

New Hampshire: Pub. Stats. 1891, chap. 191, §§ 8-13, "Administrator."

⁴⁴ Miller v. Southwestern R. R. Co., 55 Ga. 143 (1875); Gibbs v. City of Hannibal, 82 Mo. 143, 148 (1884).

⁴⁵ Arkansas: Mansf. Dig., § 5226. Or the heirs-at-law, in which case all must be joined. St. Louis &c. Ry. Co. v. Needham, 52 Fed. Rep. 371 (1892).

Alabama: Code 1887, § 2589. "A personal representative may maintain an action."

District of Columbia: 23 U. S. Stats., p. 307, chap. 126; Act of Congress, Feb. 17, 1885, "Personal Representative."

Illinois: 1 Starr & C. Ann. Stats., chap. 70, § 2.

Indiana: Rev. Stats. 1881, § 284.

Kansas: Gen. Stats. 1889, par. 4518.

Kentucky: Gen. Stats., chap. 57, §§ 1, 2.

Maine: Acts 1891, chap. 124.

Michigan: How. Stats. 1882, § 8314.

Minnesota: Laws of 1891, chap. 123.

representatives" are the executor or administrator.⁴⁶ The Maryland statute provides that the action "shall be brought by and in the name of the State of Maryland."⁴⁷ Some of the statutes provide in the alternative who may sue.⁴⁸

Montana: Comp. Stats. 1888, p. 911, § 982.

Nebraska: Comp. Laws 1881, chap. 21, § 2.

Nevada: Gen. Stats. 1885, § 3899.

New Jersey: Rev. 1878, p. 294, § 2; Gen. Stats. (vol. 1), p. 1188.

North Dakota: Comp. Laws Dak. 1887, § 5498.

Ohio: Rev. Stats., as amended by Act of April 13, 1880, § 6135.

Oklahoma: Stats. 1890, chap. 70, art. 4, par. 4338.

Oregon: Hill's Code, § 371.

Tennessee: Mill & V. Code, § 3131.

Utah: Comp. Laws 1888, §§ 2962, 3179.

Vermont: Rev. Laws 1890, § 2139.

Virginia: Code 1887, § 2903.

West Virginia: Code, chap. 103, § 6.

Wisconsin: Rev. Stats. 1878, § 4256.

Wyoming: Rev. Stats. 1887, § 2364b.

⁴⁶ *Dennick v. Railroad Co.*, 103 U. S. 11, 19 (1880); *City of Chicago v. Major*, 18 Ill. 349, 358 (1857); *Kramer v. Market Street R. R. Co.*, 25 Cal. 434, 436 (1864). The sole right of the personal representatives to maintain the action is not affected by the fact that the deceased was a married woman, and that the husband must have joined had the action been brought by her in her lifetime. *Whiton v. Chicago &c. R. R. Co.*, 21 Wis. 310 (1867); *South &c. R. R. Co. v. Sullivan*, 59 Ala. 272 (1877); *Dimmey v. Wheeling &c. R. R. Co.*, 27 W. Va. 32 (1885).

⁴⁷ Pub. Gen. Laws, art. 67, § 2. The State is merely a formal party. *Baltimore &c. R. R. Co. v. State*, 62 Md. 479 (1884). The beneficiaries need not be joined. *Deford v. State*, 30 Md. 179, 208 (1868).

⁴⁸ Thus in Arizona, "the action may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all." Rev. Stats. 1887, § 2150.

California: Code Civ. Pro., § 377. The deceased's "heirs or personal representatives may maintain" the action. *Idaho*, Rev. Stats. 1887, § 4100; *Montana*, Comp. Stats. 1888, p. 62, § 14.

Colorado: Gen. Stats. 1883. Husband or wife.

Connecticut: Gen. Stats. 1888. Executor or administrator.

Delaware: Rev. Code 1852, p. 644, as amended by Laws 1874, p. 644, § 2. "Widow, or, if there be no widow, the personal representatives."

Florida: Laws 1883, chap. 3439, § 2. Widow or husband.

Georgia: Code 1882, § 2971, as amended Laws of 1887, No. 588, p. 43. Widow, husband or mother, cannot be maintained by an administrator. *Miller v. Southwestern R. R. Co.*, 55 Ga. 143 (1875).

Iowa: McClain's Ann. Code, § 3732. "The legal representatives or successors in interest of the deceased."

Louisiana: Civil Code, art. 2315, as amended by Act No. 71, 1884, p. 94. "In favor of the minor children or widow of the deceased, or either of them, and, in

§ 126. When action is brought under a foreign statute.— When the action is brought in one State for the death which was caused in another State, the party plaintiff is the person or persons designated by the statute of the State in which the death was caused, and not by the statute of the State where the action is brought, in case there is any dissimilarity between the two statutes. The parties for whose benefit the action may be brought is part of the right created by the statute and not of the remedy. It is, therefore, determined by the *lex loci* and not by

default of these, in favor of the surviving father and mother, or either of them." In case of the death of a minor married daughter, the parents may sue. *Walton v. Booth*, 34 La. Ann. 913 (1882). For the death of a husband and father the action may be brought by the widow individually and as tutrix of her minor children. *Curley v. Illinois Cent. R. R. Co.*, 40 La. Ann. 810 (1888); *Clairain v. Western U. Tel. Co.*, id. 178 (1888).

Mississippi: Code 1892, § 663. "Widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of a child for the death of an only parent."

Missouri: Rev. Stats. 1889, § 4425. First by husband or wife of the deceased.

New Mexico: Comp. Laws 1884, as amended by Laws 1891, chap. 49, § 2308. Similar to the Missouri statute.

North Dakota: Comp. Laws of Dak. 1887, § 5499. "Widow, heir, or personal representatives of the deceased."

South Dakota: Same as North Dakota.

Pennsylvania: 2 Brightly's *Purd. Dig.*, p. 1267, § 4. Husband, widow, children or parents of the deceased. Brightly's *Purd. Dig. Supp.*, p. 2252, § 70, "Widow and

Lineal Heirs." Under the Act of April 26, 1855, P. L. 309, which gives a right to recover damages for an injury causing death, a nonresident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son. *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525 (1897).

Texas: Sayles' *Civ. Stats.*, § 2904. "The action may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all."

Washington: Hill's *Ann. Stats. & Code* 1891, § 138. Widow, or widow and her children, or child or children of a man killed in a duel, "heirs or personal representatives."

Quebec: *Civ. Code Lower Can.*, p. 287, art. 1056. "His consort and his ascendant and descendant relations have a right." The widow's right to sue is not divested by her subsequent marriage. *International &c. R. R. Co. v. Kuehn*, 70 Tex. 582 (1888); *Crockett v. St. Louis &c. Co.*, 52 Mo. 457 (1873); 45 Mo. 562 (1870); *Georgia &c. R. R. Co. v. Garr*, 57 Ga. 277 (1876). Or by the fact that the wife has been living in separation from her husband. *Dallas &c. Ry. Co. v. Spicker*, 61 Tex. 427 (1884).

the *lex fori*.⁴⁹ The form of remedy as to parties must be in accordance with the statute from which the right of action is derived.⁵⁰

§ 127. **Foreign executors or administrators.**—Foreign executors or administrators, in the absence of a statute empowering them to do so, cannot sue,⁵¹ but otherwise when authorized by statute.⁵² In Kansas, it was held that the widow of a nonresident, who was killed by the negligent act of a railroad company in the State of Kansas, is entitled to sue in such capacity but not as administratrix.⁵³ It is a general and well-settled doctrine, recognized both in England and America, that no suit can be maintained or brought by any executor or administrator in his official capacity, in the courts of any other country, except the one from which he derives his authority. To authorize a foreign administratrix to sue in the State of Georgia, under the act of 1850 (Cobb, 341), the intestate must have departed this life out of that State.⁵⁴ A temporary administrator may sue.⁵⁵

⁴⁹ Ray on Negligence of Imposed Duties, §§ 178, 179; Dennick v. Central R. R. Co., 103 U. S. 11 (1880); Western &c. R. R. Co. v. Strong, 52 Ga. 461 (1874); Selma &c. R. R. Co. v. Lacey, 49 id. 106 (1873); Patten v. Pittsburgh &c. Ry. Co., 96 Pa. St. 169 (1880); Usher v. West Jersey R. R. Co., 126 id. 206 (1889); Wooden v. Western &c. R. R. Co., 123 N. Y. 10 (1891); Illinois Central R. R. Co. v. Crudup, 63 Miss. 291 (1885); Nashville &c. R. R. Co. v. Sprayberry, 9 Heisk. 852 (1872); 8 Baxt. 342; Leonard v. Columbia &c. Co., 84 N. Y. 48 (1881); Bruce v. Cincinnati &c. R. R. Co., 83 Ky. 174 (1885).

⁵⁰ Lower v. Segal, 30 Vr. 66 (1896); Usher v. West Jersey R. R. Co., 126 Pa. St. 206 (1889).

⁵¹ Williams on Executors (Randolph & Tal. ed.), p. 30, n.; Tiffany on Death by Wrongful Act, § 110.

⁵² Jeffersonville R. R. Co. v. Hendricks, 26 Ind. 228 (1866); Union Pac. Ry. &c. Co. v. Shacklet, 119 Ill. 232 (1887), affirming

10 Bradw. 404; 105 Ill. 364; Kansas Pac. Ry. Co. v. Cutter, 16 Kan. 568 (1876); distinguished, Limekiller v. Hannibal &c. R. R. Co., 33 Kan. 83 (1885). See Hulbert v. City of Topeka, 34 Fed. Rep. 510 (1888); Marvin v. Maysville Street &c. Co., 49 Fed. Rep. 436 (1892); New Jersey, Gen. Stats., p. 1429, § 20; P. L. 1896, p. 173. A nonresident appointed an administrator in the State of New York cannot, as such administrator, maintain an action under Code of Civ. Pro., § 1780, against a foreign corporation upon a cause of action for a tort which did not arise within the State of New York. Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315 (1889).

⁵³ Chicago &c. Ry. Co. v. Mills, Kan. (1897); 1 Am. Neg. Rep. 242. See Lower v. Segal, 30 Vr. 66 (1896).

⁵⁴ Southwestern R. R. Co. v. Paulk, 24 Ga. 356 (1858).

⁵⁵ Houston &c. Ry. Co. v. Hook, 60 Tex. 403 (1883); Louisville &c.

The letters of administration granted by the surrogate are conclusive of his authority to bring the action.⁵⁶

§ 128. **Assignment of action for personal injuries.**—The right of action to recover damages for a personal injury cannot be transferred or assigned,⁵⁷ although under the Iowa statute (§ 2525, Code), it has been held that such a claim, based upon a personal tort, may be assigned or transferred like any other cause of action.⁵⁸

§ 129. **Survival of action for personal injuries — Statutes.**—An action for personal injuries at common law dies with the person, which is tersely expressed by the Latin maxim, *actio personalis moritur cum persona*,⁵⁹ unless it is made to survive by statute,⁶⁰ which is the case in some of the States. Hence it

R. R. Co. v. Chaffin, 84 Ga. 519 (1889). For the jurisdiction of probate courts to appoint an administrator, see Williams on Executors (vol. 1), p. 481, Randolph & Talcott ed., 1894; Tiffany on Death by Wrongful Act, § 111; Thomas on Neg. 501.

⁵⁶ Roderigas v. East River Sav. Inst., 63 N. Y. 460 (1875); Kelly v. West, 80 id. 139 (1880).

⁵⁷ Dicey on Parties to Actions, p. 382. See § 97. So by statute in New York. Birdseye's Rev. Stats., Codes & Laws of N. Y. 1889 (vol. 1), p. 124, § 2; Morenais v. Crawford, 51 Hun, 89, 95 (1889); Hunt v. Conrad, 47 Minn. 557 (1891).

⁵⁸ Gray v. McCallister, 50 Iowa, 497 (1879); Vimont v. Chicago & C. Ry. Co., 69 id. 296 (1886).

⁵⁹ 2 Williams on Executors (Randolph & Tal. ed.), 4; Cox v. New York & C. R. R. Co., 11 Hun, 621 (1877); Jacksonville Street Ry. Co. v. Chappell, 22 Fla. 616 (1886). So by Vermont statute. By Rev. Stats., chap. 87, § 8, of Maine, ac-

tions of "trespass and trespass on the case shall survive." Withee v. Brooks, 65 Me. 14, 18 (1875).

⁶⁰ Dicey on Parties to Actions, p. 404. Survive by statute in the following States. See § 147.

Arkansas: Dig. Stats. 1884, § 5223.

Colorado: Ann. Stats. 1891, § 2917.

Connecticut: Gen. Stats. of Conn. 1888, p. 239, §§ 1007, 1008; Murphy v. New York & C. R. R. Co., 29 Conn. 496 (1861).

Georgia: Code of Ga. 1883, p. 744, § 2967.

Illinois: Starr & Curtis' Ann. Stats. 1885 (vol. 1), p. 247; p. 123, § 123; Rev. Stats. 1891, chap. 3, § 122.

Iowa: Miller's Rev. Code of Iowa (1888), p. 866, § 2525; Shafer v. Grimes, 23 Iowa, 550 (1867).

Kansas: Gen. Stats. 1889, § 4516.

Kentucky: The Ky. Stats. 1894, p. 176, § 10; Gen. Stats. 1887, chap. 10, § 1.

follows that at common law the personal representatives of the deceased cannot sue for injuries to the person of the deceased. There is a distinction between the abatement of a suit by the death of one or both of the parties to it, and the abatement of a cause of action by force of the maxim *actio personalis moritur cum persona*. The first is a matter of procedure only.⁶¹

Massachusetts: Pub. Stats. 1882, p. 958, § 1; Pub. Stats., chap. 165, § 1; chap. 166, § 1.

Maryland: Pub. Gen. Laws of Md. 1888, p. 1115, § 25.

Missouri: Actions for injuries to the person do not abate pending an appeal to the Supreme Court by reason of the death of the plaintiff in whose behalf the judgment was rendered. *Lewis v. McDaniel*, 82 Mo. 577 (1884); *Lewis v. St. Louis & C. R. R. Co.*, 59 id. 495 (1875). *Aliter* when the judgment is for the defendant. *Woehrlin v. Schaffer*, 17 Mo. App. 442 (1885).

Montana: Comp. Stats. of Mont. 1887, § 22.

New Hampshire: Pub. Stats. N. H. 1891, chap. 191, p. 617, §§ 8, 15.

New Jersey: Gen. Stats. of N. J. (vol. 2), p. 1426, § 4.

North Carolina: After verdict shall be rendered in any action for a wrong such action shall not abate by the death of a party. The Code of No. Car. 1883, § 188, subd. 2.

Oklahoma: Stats. of Okla. 1893, § 4311.

Oregon: Same as No. Car.; Hill's Ann. Laws of Or. 1892, p. 162, § 39.

Pennsylvania: Brightly's Purd. Dig. 1894, p. 55, § 10; p. 1603, § 2. Rhode Island: Pub. Stats. of R. I. 1882, p. 552, § 8.

Tennessee: Code of Tenn. 1884, § 3560.

Vermont: Gen. Stats. of Vt. 1870, p. 391, § 11. See Rev. Laws 1880, §§ 2132, 2133; *Bradley v. Andrews*, 51 Vt. 525 (1879).

Virginia: Not to abate pending suit. Code of Va. 1887, § 2906. See § 2650.

Washington: Hill's Ann. Stats. & Codes of Wash. (vol. 2), §§ 148, 704.

Wisconsin: Chap. 280, Laws of 1887; *Lehmann v. Farwell*, 95 Wis. 185 (1897).

Wyoming: Rev. Stats. 1887, §§ 2531, 2532, 2060, 2061. See Williams on Executors (vol. 2), p. 20, n., Randolph & Talcott ed.

⁶¹ Broom's Leg. Max. 905; Ray on Negligence of Imposed Duties, § 167.

CHAPTER V.

PARTIES DEFENDANT.

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| <p>§ 130. Parties defendant, in general.</p> <p>131. Joint wrongdoers.</p> <p>132. Applications of the rule — Illustrative cases.</p> <p>133. Joint wrongdoers — Railroad companies.</p> <p>134. Husband and wife.</p> <p>135. Husband and wife — Divorce — Separation.</p> <p>136. Master and servant — Joint liability.</p> <p>137. Master and servant — Joint liability — Continued.</p> <p>138. Independent contractors.</p> <p>139. Landlord and tenant — Joint liability.</p> <p>140. Corporations — Dissolution.</p> | <p>§ 141. Joint-stock companies.</p> <p>142. Receivers — Permission to sue — Practice — Statutes.</p> <p>143. Partners.</p> <p>144. Infants.</p> <p>145. Lunatics and idiots.</p> <p>146. Death by wrongful act, neglect — Parties defendant.</p> <p>147. Death of wrongdoer extinguishes liability at common law—American statutes.</p> <p>148. Nonjoinder, or misjoinder of plaintiffs or defendants.</p> |
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§ 130. Parties defendant, in general.— The person or corporation causing the injury to another is the proper party to be made defendant in an action to recover damages for an injury caused by negligence, *i. e.*, the person or corporation liable in law for causing the injury and damage.¹ Thus, it is said one “is responsible only for the natural and proximate consequences of his acts and not for the remote consequences not clearly connected with the act complained of.”²

¹ Whart. on Neg., §§ 780, 786; the law must first be determined before the proper party defendant can be ascertained. Proximate and remote cause, in this connection, mean respectively where there is the presence or absence of some adequate intermediate cause to which the injury can or cannot be attributed. See Whart. on Neg., chap. 3, § 73 *et seq.*, “Causal Connection;” Shearm. & Redf. on Neg. (5th ed.), § 25 *et seq.*

² Dicey on Parties to Actions, p. 409. This point involves the subtle doctrine of causation — proximate and remote causes — and is more properly treated under that head than in a chapter on parties defendant to an action; although it is quite true that the defendant's liability in the eye of

§ 131. **Joint wrongdoers.**—In the previous section it was stated that the person or corporation causing the injury and damage to another is the proper party to be made defendant. It frequently happens that the injury and damage complained of are not the result of the acts of a single person or corporation, but are produced by the joint act or acts of two or more persons or corporations acting in concert; in such cases the rule is, that one, or any, or all of several joint-wrongdoers may be sued and joined in the action as defendants;³ or as stated by Mr. Justice Baker, the rule is, “parties who act in concert and co-operate in doing a negligent act which causes an injury, are liable, either jointly or severally, to the person injured, for the damage thereby occasioned.”⁴ The reason for the rule is that every person who joins in committing a tort is separately liable for it, and cannot escape liability by showing that another person or corporation is liable also; nor can one of several wrongdoers compel the plaintiff to sue him together with the persons with whom he has joined in committing the wrong.⁵ When separate and independent acts of negligence of two persons are the direct causes of a single injury to a third person and it is impossible to determine in what proportion each contributed to the

The question of causation is intimately connected with the defense of contributory negligence, because if the plaintiff's negligence contributed to his injury the defendant in law is said not to be the cause of the injury, and, therefore, not liable to answer in damages.

³ Dacey on Parties to Actions, p. 430; Whart. on Neg., § 788; Thomas on Neg. 1035; Shearm. & Redf. on Neg. (5th ed.), § 122; Cooley on Torts, 137; Hawkesworth v. Thompson, 98 Mass. 77 (1867); Klaunder v. McGrath, 35 Pa. St. 128 (1860); Turner v. Hitchcock, 20 Iowa, 310 (1866); Newman v. Fowler, 8 Vr. 89 (1874); Markham v. Houston &c. Nav. Co., 73 Tex. 247 (1889); Creed v. Hartman, 29 N. Y. 591 (1864); Holly v. Town &c. of Torrington,

63 Conn. 426, 433 (1893); Elliott v. Field, 21 Colo. 378 (1895); Kansas City v. Slaughter, 53 Kan. 431 (1894); Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481 (1890); City of Peoria v. Simpson, 110 id. 294 (1884).

⁴ Andrews v. Boedecker, 126 Ill. 605, 610 (1888). Where it is sought to charge two owners of a joint business with negligence, the actual presence of one of the defendants at the moment of the accident is not necessary to make him liable, if the other facts and circumstances are sufficient to show liability. Baker v. Hagey, 177 Pa. St. 128 (1896).

⁵ Dacey on Parties to Actions, p. 431; Creed v. Hartman, 29 N. Y. 591 (1864); Fisher v. Cook, 125 Ill. 280, 283 (1888); Turner v. Hitchcock, 20 Iowa, 310 (1866).

injury, either is responsible for the whole injury.⁶ So where two persons co-operate in the management of dangerous machinery, such as the owner and inspector, in a particular indispensable to its safe use,⁷ so all persons aiding or assisting in creating or maintaining a nuisance,⁸ so when a party is injured by the concurrent tort of two he may sue either, and this right is not affected by any consideration of primary or secondary duties of the tort-feasors as between themselves.⁹ When the action is brought against several codefendants it is essential that the wrong committed be joint, but a judgment recovered against one of several wrongdoers is a bar to an action against the others for the same cause of action,¹⁰ or if the injured person accepts satisfaction from one of such joint tort-feasors, he cannot sue the others.¹¹ The action cannot be maintained against several defendants jointly, when each acted independently of the others, and there was no concert or unity of design between them. In

⁶ *Slater v. Mersereau*, 64 N. Y. 138 (1876); 5 *Daly*, 445. Drivers racing horses unlawfully are jointly and severally liable, though only one came in contact with the deceased. *Hanrahan v. Cochran*, 12 App. Div. 91; 42 N. Y. Supp. 1031 (1896).

⁷ *Van Winkle v. American Steam Boiler Co.*, 23 Vr. 240, 245 (1890). In that case Chief Justice Beasley said: "That rule is but the creature of social justice. That a man cannot do an act for his own benefit or pleasure, the natural consequence of which will be detrimental to the equal rights of another, is an equitable principle of importance to the common welfare; and the rule that one man cannot, with impunity, assist another in doing such wrongful act, appears to be a necessary corollary to the proposition, unless such proposition is to be regarded as purely formal and arbitrary."

⁸ *Comminge v. Stevenson*, 76 Tex. 642 (1890).

⁹ *Gates v. Pennsylvania R. R. Co.*, 150 Pa. St. 50 (1892). Case of one creating a defect in a highway; such person or the municipality, after the defect has been brought to its notice, may be sued.

¹⁰ *Ding v. Hoare*, 13 M. & W. 494 (1844). It is pleadable in bar, and not in abatement. *Ib.*; *Turner v. Hitchcock*, 20 Iowa, 310 (1866). The plaintiff may recover several judgments though he can have but one satisfaction. *Severin v. Eddy*, 52 Ill. 189 (1869); *Gross v. Pennsylvania &c. R. R. Co.*, 65 Hun, 191 (1892). Unsatisfied judgment against one does not bar further recovery against another. *City of Roodhouse v. Christian*, 158 Ill. 137 (1895).

¹¹ *Spurr v. North Hudson County R. R. Co.*, 27 Vr. 346 (1894). A release given to one is a good defense by the others. *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628 (1871); *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. St. 187 (1868); *Turner v. Hitchcock*, 20 Iowa, 310 (1866).

such case the tort of each defendant is several when committed, and it does not become joint because afterwards its consequences unite with the consequences of several other torts committed by other persons.¹²

§ 132. **Applications of the rule — Illustrative cases.**— The joinder or nonjoinder of two or more parties defendant in actions for personal injuries is applied and illustrated in many reported cases. Thus, where one who superintends, although gratuitously and not under any contract, work done on land of another and through whose negligence as well as that of such other, damage is done to a third person by the work, is liable therefor in an action by such third person against him and such other person jointly.¹³ The owners of a party wall dividing

¹² *Miller v. Highland Dutch Co.*, 87 Cal. 430 (1891). The rule is stated by Mr. Justice Scott thus: "For separate acts of trespass separately done, or for positive acts negligently done, although a single injury is inflicted, the parties cannot be jointly held liable to the party injured. If there is no concert of action or no common intent, there is no joint liability. But a different principle applies when the injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them. In such cases the injured party may have his election to sue all parties owing the common duty, or each separately, treating the liability as joint or separate." *City of Peoria v. Simpson*, 110 Ill. 294 (1884).

"Persons who act separately, each causing a separate injury, cannot be made jointly liable, even though the injuries thus committed are all inflicted at one time, and are precisely similar in character." *Shearm. & Redf. on Neg.* (5th ed.), § 123; *Williams v. Shel-*

don, 10 Wend. 654 (1833); *Newman v. Fowler*, 8 Vr. 89 (1874); *Boyd v. Philadelphia Ins. Patrol*, 113 Pa. St. 269 (1886); *Chipman v. Palmer*, 77 N. Y. 51 (1879); *City of Independence v. Ott*, 135 Mo. 301 (1896). Thus the doctrine of the liability of joint tort-feasors has no application to the case of an injury arising from the joint operation of the negligence of a city in not repairing its sidewalk, and of an electric company in allowing a charged wire to be down. *City of Roodhouse v. Christian*, 158 Ill. 137 (1895).

In this respect the rule differs from joint contractors. In such cases the rule requires that all the joint contractors shall be sued together as parties defendants, and the other parties can insist upon such joinder of parties. See *Shearm. & Redf. on Neg.* (5th ed.), § 116.

¹³ *Hawkesworth v. Thompson*, 98 Mass. 77 (1867). The decision in this case is placed on the ground that both are negligent and their liability is the same.

their lots are jointly liable for injuries sustained in consequence of its falling through decay and want of repair.¹⁴ Where the duty is imposed upon two towns or counties to keep a bridge in repair which spans a stream dividing them, such towns or counties are severally as well as jointly liable for its nonrepair.¹⁵ So where a duty rests upon both a city and the owner of the premises to keep the sidewalk in repair fronting the premises over an excavation, a failure to do so is a common neglect of duty. Both will be liable, either jointly or severally, to one injured in consequence of such neglect.¹⁶ A. loaned a wagon to B. and C., who each furnished a horse, and then at their invitation A. rode with them, B. driving; A., B. and C. were jointly liable for the negligence of B. in driving and causing injury to a fourth person.¹⁷ At common law a joint action will not lie against the separate owners of dogs which unite in doing mischief or damage to a third person. Each owner is liable only for the damage done by his own dog and not for that which is done by the dogs which do not belong to him.¹⁸ The fact that there may be difficulty in ascertaining the *quantum*

¹⁴ *Klauder v. McGrath*, 35 Pa. St. 128 (1860). So the owners of three adjacent lots on which there is a common front wall are jointly liable for damages caused by the falling of the wall. *Simmons v. Everson*, 124 N. Y. 319 (1891).

¹⁵ *Reid v. Mayor &c. of New York*, 139 N. Y. 534 (1893), affirming 68 Hun, 110; *Shaw v. Town of Potsdam*, 11 App. Div. 508 (1896); 42 N. Y. Supp. 779; *Hawxhurst v. Mayor &c. of New York*, 43 Huh, 588 (1887).

¹⁶ *City of Peoria v. Simpson*, 110 Ill. 294 (1884). A telephone wire which has become broken during a storm is negligently allowed to remain for four months suspended from a tree overhanging a street, and the municipality has both actual and constructive notice of the obstruction; both are liable to one injured while using the street.

District of Columbia v. Dempsey, 13 App. Cas. (D. C.) 533 (1898).

¹⁷ *Bishop v. Ely*, 9 Johns. 294 (1812). See *Davey v. Chamberlain*, 4 Esp. 229 (1803). Other cases of joint liability; owner and contractor. *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481 (1890); *Faren v. Sellers*, 39 La. Ann. 1011 (1887). Wires of two electric companies. *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337 (1895); *United Electric Ry. &c. Co. v. Shelton*, 98 Tenn. 423 (1890).

¹⁸ *Nierenberg v. Wood*, 30 Vr. 112 (1896); *Van Steenburgh v. Tobias*, 17 Wend. 562 (1837); *Russell v. Tomlinson*, 2 Conn. 206 (1817); *Adams v. Hall*, 2 Vt. 9 (1829); *Auchmuty v. Ham*, 1 Den. 495 (1845); *Partenheimer v. Van Order*, 20 Barb. 479 (1855). Last case was one where injury was done by cows.

of damage done by each dog does not afford any ground for holding their owners jointly liable.¹⁹

§ 133. **Joint wrongdoers — Railroad companies.**— Many of the railroads of the United States are either leased to other companies which operate them, or contracts with other companies are made permitting such companies to run over their roads or use their stations; in such cases injuries frequently result from the negligence of either company or from the joint negligence of both companies. As applied to such cases Mr. Justice Valentine, of the Supreme Court of Kansas, stated the rule of law to be thus: "Besides it is a general principle of law that a railroad company cannot escape the performance of any duty or any obligation imposed upon it by its charter or by the general laws of the State by voluntarily surrendering its road or the control thereof into the hands of others; and whether it operates its road itself or whether it permits others to do it, it is generally liable for all injuries resulting from the negligent management or negligent operation of the road."²⁰ The lessee company owes the same duty to passengers of the company owning the depot and roadbed, lawfully on the ground, as it does to its own passengers.²¹ But for injuries sustained in the oper-

¹⁹ Van Steenburgh v. Tobias, 17 Wend. 562 (1837). See Chipman v. Palmer, 77 N. Y. 51, 54 (1879).

²⁰ Smith v. Atchison &c. R. R. Co., 25 Kan. 738, 745 (1881); Pennsylvania Co. v. Ellett, 132 Ill. 654 (1890); Shearm. & Redf. on Neg. (5th ed.), §§ 120a, 459; Benton v. North Carolina R. R. Co., 122 No. Car. 1007 (1898); Kinney v. North Carolina R. R. Co., 122 id. 961 (1898); International &c. R. R. Co. v. Kuehn, 70 Tex. 582 (1888).

²¹ Haff v. Minneapolis &c. Ry. Co., 14 Fed. Rep. 558 (1882). The G. Railroad Company operated by T., a receiver of the S. railroad, was held not liable for damages resulting from the negligence of T., and the R. Railroad Company, used by T. under an arrangement

independent of the G. company. McCaffrey v. Georgia Southern R. Co., 69 Ga. 622 (1882).

For other cases, see Gross v. Pennsylvania &c. R. R. Co., 65 Hun, 191 (1892); Wasmer v. Delaware &c. R. R. Co., 80 N. Y. 212 (1880). "It had the possession, the use and the control of the road, and could not keep and maintain the rails in such way in the street as to be dangerous to travellers thereon, and yet escape responsibility. He who knowingly maintains a nuisance is just as responsible as he who created it." Id. 216. Thus where the plaintiff was set down from a train on a railroad platform used in common with an intersecting road, which plaintiff intended to take, it was

ation of the road by the lessee, over which the lessor has no control, the lessee is solely liable, unless the lease was unauthorized, in which case both lessor and lessee are liable.²² One injured by a collision between a locomotive of a steam railroad company and a car, in which he was a passenger, of a street railway company, may maintain a joint action against both companies if the collision was produced by the neglect of the steam railroad company to give notice of the approach of the locomotive, concurring with the neglect of the street railway company to observe proper care in crossing the steam railroad track. Although such duties are diverse and the neglect to perform each is separate and disconnected, yet as the wrongdoing of one company unites with that of the other in causing injury

held that the company which brought him there was liable for an injury sustained by him from a defect in the platform, and this without regard to the question of which company in fact owned it, or was bound to keep it in repair. *Wabash &c. Ry. Co. v. Wolff*, 13 Ill. App. 437 (1883). Where a railroad is owned by one company, and controlled and operated *exclusively* by another, the company controlling and operating the road is liable for an injury done by a locomotive operated by its employees. *Harper v. Newport News &c. Co.*, 90 Ky. 359 (1890). So if a train of cars of one railroad company running on the road of another company be under the exclusive control of the servants of the latter, the latter is liable for all damages occurring through negligence. But if the servants of both companies jointly control the train, both companies are liable. *Nashville &c. R. R. Co. v. Carroll*, 6 Heisk. 347 (1871). Where a person is injured by the negligence of two or more persons operating a railway, he has a cause of action against all or any of them.

Kane v. Smith, 80 N. Y. 458 (1880). *Trains in collision. Chicago &c. R. Co. v. Ransom*, 56 Kan. 559 (1896); *Flaherty v. Minneapolis &c. Ry. Co.*, 39 Minn. 328 (1888). Where a railroad company, operating its road in its own name, contracts with another company, to make up its trains in the depot of the latter, the former company is liable for an injury to a passenger occurring on its train while being made up by the servants of the latter, and it makes no difference that the servants were employed and paid by the latter road. *Hannibal &c. R. R. Co. v. Martin*, 11 Ill. App. 386 (1882); *Smith v. Memphis &c. R. R. Co.*, 18 Fed. Rep. 304 (1883); *Pierce on Railroads*, p. 274; *Smith v. Atchison &c. R. R. Co.*, 25 Kan. 738 (1881); *Freeman v. Minneapolis &c. Ry. Co.*, 28 Minn. 443 (1881); *Abbott v. Johnstown &c. R. R. Co.*, 80 N. Y. 27 (1880); *West Chicago &c. R. R. Co. v. Piper*, 165 Ill. 325 (1897).

²² *Shearm. & Redf. on Neg.* (5th ed.), §§ 120a, 413, 502, and cases there cited; *Howard v. Chesapeake &c. Ry. Co.*, 11 App. Cas. (D. C.)

the tort is joint and one or both tort-feasors may be sued.²³ Two companies using in common a defective platform, both companies are liable for injuries caused thereby.²⁴ A railroad and sleeping-car company are jointly and severally liable for the negligence of a person in charge of a sleeping or drawing-room car.²⁵

§ 134. **Husband and wife.**—Husbands and wives at common law cannot sue each other. None of the Married Woman's Acts are so broad as to permit such suits, except for causes growing out of the marriage contract, such as for support, maintenance, divorce and the like. By some of the statutes it is expressly so declared.²⁶ At common law the husband is liable for the wife's torts committed during coverture, and the husband and wife must be sued jointly for all such torts committed by the wife, either before marriage or during coverture.²⁷ For the tort of the wife, whether committed before or after marriage, an action cannot be brought against the husband alone; on the death of the husband the wife remains liable for all torts committed by her before or after marriage;²⁸ after the death of the wife the husband is not liable for any tort committed by her, except those torts which she may have committed as his agent; for a tort com-

300 (1897); *Pennsylvania Co. v. Ellett*, 132 Ill. 654 (1890); *Balsley v. St. Louis &c. R. R. Co.*, 119 id. 68 (1886).

²³ *Matthews v. Delaware &c. R. R. Co.*, 27 Vr. 34 (1893). If the jury negative the negligence charged against one of such tort-feasors, a verdict against the other is not objectionable. *Ib.* The dismissal of the complaint as to one of two joint tort-feasors cannot be complained of by the other. *Wallace v. Third Ave. R. R. Co.*, 36 App. Div. 57 (1899).

²⁴ *Wabash &c. Ry. Co. v. Wolff*, 13 Ill. App. 437 (1883); *Lucas v. Pennsylvania Co.*, 120 Ind. 205 (1889); 119 id. 583.

²⁵ *Pennsylvania Co. v. Roy*, 102

U. S. 451 (1880); *Cleveland &c. R. Co. v. Walrath*, 38 Ohio St. 461 (1882); *Dwinelle v. New York &c. R. R. Co.*, 120 N. Y. 117 (1890); *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417 (1888); *Airey v. Pullman Palace Car Co.*, 50 id. 648 (1898); *Thorpe v. New York &c. R. R. Co.*, 76 N. Y. 402 (1879).
²⁶ Pub. Stats. of Mass. 1882, p. 819, § 7.

²⁷ *Dacey on Parties to Actions*, p. 476; *Head v. Briscoe*, 5 Car. & P. 484 (1833); *Clark v. Bayer*, 32 Ohio St. 299 (1877); *Hildreth v. Camp*, 12 Vr. 306 (1879); *Lane v. Bryant*, 100 Ky. 138 (1896).

²⁸ See *Wright v. Leonard*, 30 L. J. C. P. (N. S.) 367 (1861).

mitted by husband and wife jointly, the suit should be against the husband alone.²⁹ A married woman, for a tort committed by the violation of any duty imposed upon her by law, with respect to her separate property, is liable to the same extent as if she was unmarried.³⁰ In a previous section it was pointed out, that by statute in some of the States, the suit by or against an unmarried woman shall not abate by her marriage during its pendency.³¹ In those States where, by statute, a married woman may sue and be sued as a *feme sole* she is the proper and only party defendant for injuries caused by her negligence.³² By statute, in Connecticut, it is provided that an action may be maintained against any married woman "for any tort committed by her without the actual coercion of her husband."³³ So by statute in Minnesota.³⁴ In New Mexico it is provided that the Married Woman's Act shall not exempt a husband from liability for torts committed by his wife.³⁵ The Georgia statute provides that every man shall be liable for torts committed by his wife.³⁶

²⁹ Clark v. Bayer, 32 Ohio St. 299, 311 (1877). If, in the commission of the tort, she acted under marital coercion, and such fact does not appear on the face of the petition, her defense must be made by answer. *Ib.* If the tort is done by the wife in the company of the husband, the law presumes coercion on his part, which excuses her from liability, but such presumption may be rebutted by proof. The presence and command of the husband must concur to justify the exemption of the wife from responsibility. *Hildreth v. Camp*, 12 Vr. 306 (1879).

³⁰ Mayhew v. Burns, 103 Ind. 328 (1885); Lane v. Bryant, 100 Ky. 138 (1896).

³¹ See § 113; Code of Ala. 1886, § 2602; Garland's Rev. Code of Practice 1894, § 118.

³² See § 113.

³³ Gen. Stats. of Conn. 1888, p. 234, § 984.

³⁴ Stats. of Minn. 1894, § 5532. See Birdseye's Rev. Stats., Codes & Laws N. Y. 1889 (vol. 2), p. 1690, § 6.

³⁵ Comp. Laws of N. Mex. 1884, § 1091. The husband is liable for torts committed by his wife at common law; not changed by Act of May 1, 1861, in Ohio. *Fowler v. Chichester*, 26 Ohio St. 9 (1874); *Head v. Briscoe*, 5 Car. & P. 484 (1833).

³⁶ Code of Ga. 1895, § 3817. In some of the States it is provided by statute that if husband and wife be sued together the wife may defend her own right; and if the husband neglects to defend, she may defend his right. *Idaho*, Rev. Stats. 1887, § 4094; *Nebraska*, Comp. Stats. 1893, p. 857, § 35; *Nevada*, Gen. Stats. 1885, § 3030; *Utah*, Comp. Laws 1888, § 3173.

§ 135. **Husband and wife — Divorce — Separation.**— Divorce *a vinculo matrimonii* leaves the wife liable and frees the husband from responsibility for all torts committed by her.³⁷ Not so, however, when they are judicially separated,³⁸ or living separate and apart by voluntary agreement.³⁹

§ 136. **Master and servant — Joint liability.**— It is an elementary rule of law that a master is responsible for the negligence of his servants causing damage to third persons when done or committed in the course of the servant's employment.⁴⁰ A public officer is not liable for the torts of his official subordinates.⁴¹ The master may be made the sole defendant to the action, or the master and servant may be sued jointly, in that class of cases in which the servant is individually responsible. The test of the servant's responsibility to third persons is said to be a distinction between those acts of the servant which are mere nonfeasance and those acts which are misfeasance; for the latter the servant as well as the master is individually responsible to third persons.⁴² The master and servant in such cases may be sued jointly as defendants. But, where the master's liability is based on his agent's nonfeasance, or mere personal omission of duty, they are not jointly liable and cannot be joined as defendants,⁴³ although it has been said the right

³⁷ *Capel v. Powell*, 34 L. J. C. P. (N. S.) 168 (1864); *Head v. Briscoe*, 5 Car. & P. 484 (1833).

³⁸ *Head v. Briscoe*, 5 Car. & P. 484 (1833). In the above case husband and wife were permanently living apart.

³⁹ *Ib.* See 20 & 21 Vict., chap. 85.

⁴⁰ *Shearm. & Redf. on Neg.* (5th ed.), § 141 *et seq.* See § 63.

⁴¹ *Dacey on Parties to Actions*, p. 461; *Franklin v. Low*, 1 Johns. 396 (1806); *Schroyer v. Lynch*, 8 Watts, 453 (1839); *City of Richmond v. Long*, 17 Gratt. 375 (1867); *Sawyer v. Corse*, *id.* 230 (1867). He is liable, however, for his own personal negligence or default in

the discharge of his duties, and also for the negligence or default of his private agent or servant in the discharge of his official duties. *Sawyer v. Corse*, 17 Gratt. 230 (1867).

⁴² *Murray v. Usher*, 117 N. Y. 542 (1889), affirming 46 Hun, 404; *Delaney v. Rochereau*, 34 La. Ann. 1123 (1882); *Parsons v. Winchell*, 5 Cush. 592 (1850); *Campbell v. Portland Sugar Co.*, 62 Me. 562 (1873); *Clark v. Fry*, 8 Ohio St. 358, 377 (1858). In *Delaney v. Rochereau*, 34 La. Ann. 1123 (1882), it was said the doctrine of the common law does not differ from the civil law on this point.

⁴³ *Whart. on Neg.*, § 788.

to join master and servant as defendants is not clear.⁴⁴ The rule, however, seems to be settled that a master and servant can be sued jointly, when they are liable, in the character of joint wrongdoers.⁴⁵ As stated by Dr. Wharton, the rule is, a servant "when personally engaged in a tort with his master, and when independently liable, he may be joined in the same suit,"⁴⁶ the master for the negligence of his servant, the servant for his own misfeasance. Both master and servant, being liable for the same acts of negligence, may be joined as defendants.⁴⁷

§ 137. Master and servant — Joint liability—Continued.—

When a master employs a servant in a service in which he must use force against another's person or property, and the servant, in the course of his employment, uses it unlawfully, to an unlawful extent, both are liable jointly as trespassers.⁴⁸ They may be joined, so it is said, when the injury done by the servant was in pursuance of a direct command of the master, or when he has made it his own by subsequent ratification, and when at common law the form of the action against the master would be trespass, for in trespass all are principals, he who commands the trespass as well as he who commits it.⁴⁹ Thus when a master sent his servant to train two ungovernable horses in Lincoln's Inn Fields, the servant, being unable to govern them, the horses ran upon the plaintiff, injuring him, an action on the case was sustained against both master and servant, the wrong imputed to the master being the sending of

⁴⁴ 2 Thomp. on Neg., p. 892; (1878); Campbell v. Portland Sugar Parsons v. Winchell, 5 Cush. 592 Co., 62 Me. 552 (1873).

(1850). See Comp. Laws of Utah ⁴⁷ Greenberg v. Whitcomb Lumber Co., 90 Wis. 225 (1895).

⁴⁵ Dicey on Parties to Actions, ⁴⁸ Holmes v. Wakefield, 12 Allen, p. 466; Carman v. Steubenville &c. 581 (1866); Hewett v. Swift, 3 id. R. R. Co., 4 Ohio, 399 (1854); 422 (1862); Moore v. Fitchburg R. Severin v. Eddy, 52 Ill. 189 (1869); R. Co., 4 Gray, 466 (1855).

Wright v. Compton, 53 Ind. 337 ⁴⁹ 2 Thomp. on Neg., p. 891; Smith on Master & Servant, 157; Hewett v. Swift, 3 Allen, 420, 424 (1876); Suydam v. Moore, 8 Barb. (1862); Whitmore v. Waterhouse, 4 Car. & P. 383 (1830); Moreton v. Hardern, 6 Dow. & R. 275; 4 B. & C. 223 (1825).

⁴⁶ Whart. on Neg., § 246; Phelps v. Wait, 30 N. Y. 78 (1864); Hewett v. Swift, 3 Allen, 420, 422 (1862); See *contra*, Mulchey v. Methodist Religious Society, 125 Mass. 487

such horses to be trained in such a place.⁵⁰ A joint action was sustained against a railroad company and its conductor, for the act of the latter, in ejecting the plaintiff from a train under pretense that he had not paid his fare.⁵¹ So, too, a joint action of tort, in the nature of trespass, was sustained against a railroad corporation and its servant for a personal injury, inflicted by the latter in discharging the duties imposed on him by the corporation, in removing a boy forcibly from its freight depot, and in doing so kicked and severely injured him, although the boy might have been equally well removed without the use of undue or illegal force.⁵² Under the Codes of New York and Indiana, which have abolished forms of action, the master and servant may be joined in one action.⁵³

§ 138. **Independent contractors.**— When work is done by contract, that is when the contractor, usually called an “independent contractor, represents the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished,”⁵⁴ the contractor alone is responsible to third persons for his negligence or the negligence of his subordinates.⁵⁵ In such cases the contractor is the proper and only party to be made defendant in actions to recover damages caused by his negligence. There are some exceptions to this general rule, one of which was pointed out in a leading case in Connecticut, viz., that the employer must use due and reasonable care in selecting a contractor who is skillful and competent.⁵⁶ So by statute in some of the States an employer is

⁵⁰ Michael v. Alestree, 2 Lev. Wright v. Compton, 53 id. 337 172; 1 Vent. 195; 3 Keb. 650. (1876). See Burns v. Pettical, 75

⁵¹ Moore v. Fitchburg R. R. Co., Hun, 437 (1894).

⁵⁴ Shearm. & Redf. on Neg. (5th ed.), § 164; Hexamer v. Webb, 101 N. Y. 377, 385 (1886); Cunningham v. International R. R. Co., 51 Tex. 503 (1879).

⁵² Hewett v. Swift, 3 Allen, 420 (1862). See Mulchey v. Methodist Religious Society, 125 Mass. 487 (1878).

⁵⁵ Shearm. & Redf. on Neg. (5th ed.), § 168, cases there collected.

⁵³ Montfort v. Hughes, 3 E. D. Smith, 591 (1854); Phelps v. Wait, 30 N. Y. 78 (1864); Suydam v. Moore, 8 Barb. 358 (1850); Hinds v. Harbou, 58 Ind. 121 (1877); Norwalk Gas Light Co. v. Borough of Norwalk, 63 Conn. 495, 529 (1893); Brannock v. Elmore, 114 Mo. 55 (1892); Redstrake v. Swayze, 23 Vr. 129 (1889). See § 32.

liable for the acts of the contractor.⁵⁷ In a Michigan case it was said that in all ordinary transactions the relation of contractor excludes that of principal and agent or master and servant, but there is not necessarily such a repugnance between them that they cannot exist together.⁵⁸ Where the employer would be liable as well as the contractor they can be sued jointly like any other joint wrongdoers for injuries caused by their negligence.

§ 139. **Landlord and tenant — Joint liability.**— For injuries caused by defective premises an action may lie against both landlord and tenant — the landlord may be liable for the negligent construction and the tenant for the negligent use of the premises,⁵⁹ in which case the injured person may maintain an action against the owner and the tenant jointly, together with all those who receive profit from the premises;⁶⁰ or where the owner lets the premises with a nuisance upon them and the tenant occupying the premises allows the nuisance to remain, they are jointly as well as severally liable for injuries to third persons occasioned thereby.⁶¹ When the injury results from the sole negligence of the landlord or from the negligence of the tenant in the use of the premises, the landlord or tenant in such cases is the party to be made defendant in the action; but when they are both responsible, they may be sued jointly or separately as any other joint wrongdoers.⁶²

§ 140. **Corporations — Dissolution.**— Corporations are liable to be sued for torts, but as they can only act by agents or ser-

⁵⁷ Code of Ga. 1895 (vol. 2), § 5 id. 482 (1868); *Durant v. Palmer*, 3819. See § 32n. 5 Dutch. 544 (1862); *Buesching v.*

⁵⁸ *City of Detroit v. Corey*, 9 Mich. 165, 184 (1861); *Darmstaetter v. Moynahan*, 27 id. 188 (1873). 219 (1880); *Houston v. Traphagen*, 18 Vr. 23 (1885).

⁶¹ *Joyce v. Martin*, 15 R. I. 558 (1887).

⁶² See § 62; *Shearm. & Redf. on Neg.* (5th ed.), § 120. There is no joint and several liability between the tenants of the various floors of an apartment-house. *Donnelly v. Jenkins*, 58 How. Pr. 252 (1880).

⁵⁹ *Eakin v. Brown*, 1 E. D. Smith, 36, 44 (1850).

⁶⁰ *Irwin v. Fowler*, 4 Robt. 138;

vants, they are liable only for the wrongs committed by their servants or agents in the course of their employment.⁶³ In Virginia, by statute, an action does not abate by the dissolution of the corporation when a corporation is the defendant.⁶⁴

§ 141. **Joint-stock companies.**—A joint-stock company or association, such as the United States Express Company, which was formed under the laws of the State of New York, which act of incorporation expressly authorizes any such company or association to sue and be sued in the name of its president or of its treasurer, may be sued in the manner prescribed by the laws of that State, viz.: in the name of its president or treasurer.⁶⁵

§ 142. **Receivers — Permission to sue — Practice — Statutes.**—Where a corporation, which is liable to respond in damages for negligence, is in the hands of a receiver appointed by the court, the receiver, in his representative capacity, may be sued for the negligence of his servants or agents; but before suit can be brought against such receiver, permission from the court appointing such receiver to sue must first be obtained.⁶⁶ Notice of the

⁶³ Plaintiff was a stockholder in a railroad company. *Philadelphia &c. R. R. Co. v. Derby*, 14 How. 468 (U. S. 1852); *Denver &c. Ry. Co. v. Harris*, 122 U. S. 597 (1887); *State v. Morris &c. R. R. Co.*, 3 Zab. 361 (1852); 7 Am. & Eng. Ency. of Law (2d ed.), p. 825. In Montana it was held that the directors of a corporation were personally liable for the death of one killed by the explosion of powder in a warehouse, stored in an unlawful quantity. *Cameron v. Kenyon-Connell Co.*, Mont. (1899); 5 Am. Neg. Rep. 647.

⁶⁴ Code of Virginia 1887, § 2906. So in New Jersey. Gen. Stats. (vol. 1), pp. 919, 925, §§ 65, 92. In Texas upon the dissolution of a private corporation all actions at law against it abate. *Life Assn. v. Goode*, 71 Tex. 90 (1888).

⁶⁵ *Edgeworth v. Wood*, 29 Vr. 463 (1896).

⁶⁶ *Meara v. Holbrook*, 20 Ohio St. 137 (1870). And to such a suit it is no defense that the receiver was a public officer, or that he was an agent or trustee. *Klein v. Jewett*, 11 C. E. Gr. 474 (1875); affirmed, 12 id. 550 (1876); *Little v. Dusenberry*, 17 Vr. 614 (1884). Chap. 866, § 3, Rev. Stats. U. S., passed Aug. 13, 1888 (vol. 1, p. 614), provides: "That every receiver or manager of any property appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, *without the previous leave of the court* in which such receiver or manager was appointed. But such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the

application for an order giving leave to sue the receiver need not be given to the parties; notice of such application to the receiver is sufficient.⁶⁷ By act of Congress, it is not necessary to get leave of the court in which such receiver or manager was appointed before he can be sued;⁶⁸ otherwise in the absence of a statute.⁶⁹ There being no dispute as to the power of the court to make the order under which the receiver claims to have acted, the court may, in its discretion, either take cognizance of the question of the receiver's liability and determine it or permit the aggrieved party to sue at law. But if the power of the court is disputed, the court then has no choice; it must assume exclusive jurisdiction, and inhibit the aggrieved person from seeking redress against the receiver in any other tribunal.⁷⁰ In a later case the Court of Errors and Appeals of New Jersey held that a person having a legal cause of action sounding merely in tort against a receiver appointed by the Court of Chancery, has a right to pursue his redress by an action at law.⁷¹ The statute of Arizona provides that receivers shall have power, subject to the control of the court, to bring and defend suits.⁷² By statute in Virginia, an action shall not abate on the dissolution of a corporation when a corporation is defendant.⁷³

ends of justice." See *Central Trust Co. v. St. Louis &c. R. R. Co.*, 40 Fed. Rep. 426 (1889). And for a marine tort a receiver may be sued in another district without leave of the court appointing him. *Jones v. The St. Nicholas*, 49 Fed. Rep. 671 (1891).

⁶⁷ *Potter v. Bunnell*, 20 Ohio St. 150 (1870).

⁶⁸ Act of March 3, 1887, 24 Stat. at L. 552, chap. 373, § 3; Act of August 13, 1888, 25 Stat. at L. 433, 436, chap. 866; *Texas &c. Ry. Co. v. Cox*, 145 U. S. 593 (1892).

⁶⁹ *Barton v. Barbour*, 104 U. S. 126 (1881); *Davis v. Gray*, 16 Wall. 203 (1872); *Thompson v. Scott*, 4 Dill. 508 (1876); *McNulta v. Lockridge*, 141 U. S. 327 (1891); *Meyer v. Harris*, 32 Vr. 83 (1897). Liability under foreign statute. See *Texas &c. R. R. Co. v. Cox*, 145

U. S. 593 (1891); *Kinney v. Crocker*, 18 Wis. 75 (1864); *Hills v. Parker*, 111 Mass. 508 (1873); *Allen v. Central R. R. Co.*, 42 Iowa, 683 (1876). Actions *ex delicto* against receivers of foreign corporations. See P. L. 1895, N. J., p. 380.

⁷⁰ *Klein v. Jewett*, 11 C. E. Gr. 474 (1875); *Parker v. Browning*, 8 Paige, 388 (1840). See *Lyman v. Central Vt. R. R. Co.*, 59 Vt. 167 (1886); *Palys v. Jewett*, 5 Stew. 302 (1880, N. J. Eq.).

⁷¹ *Palys v. Jewett*, 5 Stew. 302 (1880, N. J. Eq.); *McNulta v. Lockridge*, 137 Ill. 270 (1891). See § 85.

⁷² Rev. Stats. 1887, § 891.

⁷³ Code of Va. 1887, § 2906. Upon the dissolution of a private corporation all actions at law against it abate. *Life Association v. Goode*, 71 Tex. 90 (1888).

§ 143. **Partners.**—The tort of one partner is considered the joint and several tort of all the partners, wherever the wrongful act complained of is connected with the business of the firm, or is incidental to it, as the business is carried on. A partner who has no direct participation in the tort of his associate is chargeable *civiliter* to the same extent, including exemplary damages, as the real actor is bound.⁷⁴ Thus, one or more, or all, of the partners in a firm, or members of an unincorporated company, may be sued separately or jointly for a wrong committed by the firm or company.⁷⁵

§ 144. **Infants.**—An infant may be sued for torts committed by him.⁷⁶ So he is liable for torts committed during infancy, after he has attained his majority. In a previous section it was pointed out that an infant must bring a suit as plaintiff by a guardian or *prochein ami*, *i. e.*, a next friend. The rule of law is alike applicable when an infant is the defendant to a suit; the infant must defend by a guardian.⁷⁷ There can be no recovery against a minor unless a guardian *ad litem* has been appointed to represent him.⁷⁸

⁷⁴ *Heirn v. M'Caughan*, 32 Miss. 17 (1856).

⁷⁵ *Dacey on Parties to Actions*, p. 467; *Story on Part.*, §§ 166, 168; 2 *Thomp. on Neg.*, pp. 1048–1049; *Moreton v. Hardern*, 4 B. & C. 223 (1825); *Ashworth v. Stanwix*, 3 El. & El. 701 (1860); *Heirn v. M'Caughan*, 32 Miss. 17 (1856); *Connolly v. Davidson*, 15 Minn. 519 (1870); *Roberts v. Johnson*, 58 N. Y. 613 (1874).

⁷⁶ See § 39; *Dacey on Parties to Actions*, p. 474; *Sheam. & Redf. on Neg.* (5th ed.), § 121; *Whart. on Neg.*, § 88; *Campbell v. Stakes*, 2 Wend. 139 (1828); *Conklin v. Thompson*, 29 Barb. 218 (1859); *Burnard v. Haggis*, 14 C. B. (N. S.) 45 (1863); *Bullock v. Babcock*, 3 Wend. 391 (1829).

⁷⁷ See §§ 118, 119; *Co. Lit.* 135b, note, 220; *Miles v. Boyden*, 3 Pick. 213, 219 (1825).

⁷⁸ *Thorp v. Minor*, 109 N. C. 152 (1891). See statute of

Alabama: *Code of Ala.* 1886, § 2579.

Delaware: *Laws of Del.*, Rev. Code as amended 1893, p. 794, § 29.

Indiana: *Ann. Stats. of Ind.* 1894, p. 783, § 259.

Iowa: By guardian or next friend. *Miller's Rev. Code* 1888, p. 887, § 2566.

Kansas: By guardian or next friend. *Gen. Stats.* 1889, § 4110.

Kentucky: *Ky. Stats.* 1894, p. 744, § 2030.

Louisiana: Suit must be brought directly against the tutor of the minor. *Garland's Rev. Code of Practice* 1894, § 115.

Massachusetts: *Pub. Gen. Stats.* 1882, p. 789, § 43.

Minnesota: *Stats. of Minn.* 1894, § 5161.

Missouri: *Rev. Stats.* 1889, § 2005.

§ 145. Lunatics and idiots.—Lunatics and idiots are liable to be sued for injuries caused by their negligence.⁷⁹ By statute in Alabama it is provided that guardians of persons of unsound mind are subject to suit “for any tort committed by him while of sound mind.”⁸⁰ The reason for this is said to be that, where one of two innocent persons must bear a loss, he must bear it whose act caused it.⁸¹ They must defend by guardian.⁸²

Nebraska: Comp. Stats. of Neb., §§ 38, 857.

New Hampshire: Pub. Stats. 1891, p. 501, § 1.

New Jersey: Rev. of N. J. 1877, p. 850, § 18; Gen. Stats. (vol. 2), p. 2536.

New Mexico: Comp. Laws 1884, § 2336.

New York: Birdseye's Rev. Stats., Codes & Laws 1889 (vol. 2), p. 2156, § 26; (vol. 1), p. 13, § 15. An infant must appear by guardian. *Ingersoll v. Mangam*, 84 N. Y. 625 (1881).

North Carolina: Code of No. Car. 1883, § 181; *Thorp v. Minor*, 109 No. Car. 152 (1891).

Ohio: Rev. Stats. 1894, § 5003.

Ontario: Official guardians. Rev. Stats. 1887, p. 484, § 131.

Texas: Sup. to Sayles' Tex. Civ. Stats. 1893, § 1211.

Vermont: By guardian *ad litem* or next friend. Gen. Stats. 1870, p. 476, § 10.

Wyoming: Rev. Stats. 1887, § 2392.

In Georgia it is provided by statute that every person shall be liable for torts committed by his child. Code of Ga. 1895, § 3817.

⁷⁹ See §§ 39, 121; *Shearm. & Redf. on Neg.* (5th ed.), § 121; *Williams v. Cameron*, 26 Barb. 172 (1857); *Hartfield v. Roper*, 21 Wend. 615, 620 (1839); *Weaver v. Wood*, Hobart, 134; *Williams v. Hays*, 143 N. Y. 442 (1894).

⁸⁰ Code of Ala. 1886 (vol. 1), § 2583; *Weemes v. Weemes*, 73 Ala. 462 (1882).

⁸¹ *Williams v. Hays*, 143 N. Y. 442, 447 (1894).

⁸² See § 121. See statute of Alabama: Code of Ala. 1886, § 2580; *Walker v. Clay*, 21 Ala. 797 (1852). The judgment is properly reversed against the lunatic himself and not against his guardian. Arizona: Rev. Stats. 1887, § 1337.

Delaware: Laws of Del., Rev. Code as amended 1893, p. 794, § 30.

Florida: Rev. Stats. 1892, p. 357, § 982.

Iowa: By guardian or next friend. *Miller's Rev. Code* 1888, p. 888, § 2569.

Louisiana: Suit must be brought against the curator. *Garland's Rev. Code of Practice* 1894, § 115.

Maine: Rev. Stats. 1883, p. 699, § 38.

Massachusetts: Pub. Stats. 1882, p. 960, § 25.

Michigan: Comp. Laws 1871, p. 1689, § 5844.

Missouri: Rev. Stats. 1889, p. 1318, § 5517.

Nevada: Gen. Stats. 1885, § 560.

New Hampshire: Pub. Stats. 1891, p. 501, § 1.

North Carolina: Code of No. Car. 1883, § 181.

Ohio: Rev. Stats. 1894, § 5000.

Rhode Island: Pub. Stats. 1882, § 7.

§ 146. **Death by wrongful act, neglect — Parties defendant.**— Lord Campbell's Act⁸³ provides that, whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, *is such as would*, if death had not ensued, *have entitled the party injured to maintain an action* and recover damages in respect thereof, *then, and in every such case*, the person who would have been liable if death had not ensued shall be liable to an action for damages. Language of like import is used in all, or nearly all, of the statutes⁸⁴ of the respective States. Many of them, in express terms, include corporations, so that the proper party defendant depends upon the same considerations as in the case of personal injury.

§ 147. **Death of wrongdoer extinguishes liability at common law — American statutes.**— The liability for a personal injury at common law, like the right of action for the same cause, dies with the wrongdoer; the maxim of the common law applies, *actio personalis moritur cum persona*. Hence it follows that the personal representatives of the deceased, *i. e.*, his executors or administrators, cannot be sued for torts committed by him, at common law.⁸⁵ This rule of the common law has been changed by statute in some of the States.⁸⁶

Vermont: Gen. Stats. 1870, p. 477, § 17.

Wyoming: By guardian or trustee. Rev. Stats. of Wyo. 1887, § 2387.

⁸³ 9 & 10 Vict., chap. 93.

⁸⁴ For a complete copy of all the statutes, see Tiffany on Death by Wrongful Act — Appendix; Analytical Table of the Statutes, *id.* xviii; *id.*, § 118. These statutes do not change the common-law rule in respect to defendants, *viz.*, that the action against a wrongdoer dies with the person who committed the wrong. See cases in § 147.

⁸⁵ Dicey on Parties to Actions, p. 479; Hamilton v. Jones, 125 Ind. 176 (1890); Stanley v. Bircher, 78 Mo. 245 (1893). Nor under Gen. Stats. 1865, 491, § 30, of Missouri.

Stats. of Minn. 1894, § 5912. An action for a purely personal tort does not survive the death of the tort-feasor. Green v. Thompson, 26 Minn. 500 (1880); Russell v. Sunbury, 37 Ohio St. 372 (1881); Moe v. Smiley, 125 Pa. St. 136 (1889); Hegerick v. Keddle, 99 N. Y. 258 (1885); *id.* 651.

⁸⁶ Arizona: Rev. Stats. 1887, § 2152.

Georgia: Code of Ga. 1895 (vol. 2), § 3825.

Illinois: Knox v. City of Sterling, 73 Ill. 214 (1874).

Iowa: Miller's Rev. Code of Iowa 1888, p. 866, § 2525.

Kentucky: Ky. Stats. 1894, p. 176, § 10.

Louisiana: Not after answer filed. Garland's Rev. Code of Prac. 1894, p. 21.

§ 148. Nonjoinder or misjoinder of plaintiffs or defendants.—

An action brought by a wrong plaintiff, or against a wrong defendant, must fail.⁸⁷ The errors which can be committed in respect to the parties to an action are of three kinds: *First*, the action may be brought in the name of the wrong plaintiff or against the wrong defendant; *Second*, the error may consist in the nonjoinder of plaintiffs or of defendants; *Third*, the error may consist of a misjoinder of plaintiffs or of defendants. A nonjoinder of plaintiffs gives rise to a plea in abatement,⁸⁸ a misjoinder of plaintiffs leads only to increased costs. A nonjoinder of defendants is no error;⁸⁹ a misjoinder of defendants leads only to increased costs.⁹⁰

New Mexico: No action pending shall abate by death of either or both parties thereto. Comp. Laws 1884, § 2139.

New Jersey: Gen. Stats. of N. J. (vol. 2), p. 1426, § 5; Tichenor v. Hayes, 12 Vr. 193 (1879).

Ohio: Bates' Ann. Stats. 1897, § 4975.

Oklahoma: Stats. 1893, par. 4312, § 434.

Oregon: Not after verdict. Hill's Ann. Laws 1892, p. 162, § 39.

North Carolina: Code 1883, § 188, par. 2.

North Dakota: Rev. Codes 1895, § 5234.

Tennessee: Code of Tenn. 1896, § 4569.

Texas: Rev. Stats. 1895, § 3353a.

Virginia: Not to abate by the death of the defendant or the dissolution of the corporation when a corporation is the defendant. Code of Va. 1887, § 2906.

Vermont: For a bodily hurt or injury, if either party dies during the pendency of such action, the action shall survive, but when there are several defendants in such action, and one or more, but not all, die, it shall be prosecuted

against the surviving defendant or defendants only. Vt. Stats. 1894, § 2447.

⁸⁷ Dicey on Parties to Actions, p. 499. If the error appears on the pleadings it may be taken advantage of by demurrer, motion in arrest of judgment or error. The points to be considered when an error is discovered are what is the effect of the error if unamended; and, secondly, can it be amended.

⁸⁸ Dicey on Parties to Actions, p. 507; Sedgworth v. Overend, 7 T. R. 279; Bloxam v. Hubbard, 5 East, 407 (1804).

⁸⁹ Nonjoinder of defendants cannot be availed of in bar. Eaton v. Boston &c. R. R. Co., 11 Allen, 500, 505 (1866). Joint tort-feasors cannot be compelled to be made parties. Hoosier Stone Co. v. McCain, 133 Ind. 231 (1892).

⁹⁰ At common law in actions *ex delicto* the plaintiff might discontinue as to one or more of the defendants and proceed against the others even after verdict, though all had joined in the same plea and had been found guilty of the same tort. Montgomery Gas Light Co. v. Montgomery &c. Ry.

Co., 86 Ala. 372 (1888). And does not affect the liability of the real wrongdoer. *Govett v. Radnidge*, 3 East, 62 (1802); *Bretherton v. Wood*, 3 Brod. & B. 54 (1821); 7 E. C. L. 345; *Pozzi v. Shipton*, 8 Ad. & E. 963 (1838). Scheme as to joinder of parties. *Dicey on Parties to Actions*, p. 509.

Actions for torts:

(a) Plaintiffs.

1. Nonjoinder — Gives rise to a plea in abatement.

2. Misjoinder — Leads only to increased costs.

(b) Defendants.

1. Nonjoinder — Has no effect.

2. Misjoinder — Leads only to increased costs.

Actions on contract:

(a) Plaintiffs.

1. Nonjoinder — Fatal unless amended.

2. Misjoinder — Leads only to increased costs.

(b) Defendants.

1. Nonjoinder — Gives rise to a plea in abatement.

2. Misjoinder — Fatal unless amended.

CHAPTER VI.

PLEADINGS.

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| § 149. Pleadings in general. | § 158. Actions for causing death |
| 150. Requisites in pleading a cause of action in accident cases. | — Existence of beneficiaries must be alleged. |
| 151. A general averment of negligence is sufficient. | 159. Appointment of plaintiff as administrator or executor must be alleged. |
| 152. The real ground of complaint should be distinctly stated. | 160. Action based on a foreign statute — Such statute must be alleged. |
| 153. Allegation that plaintiff is free from contributory negligence. | 161. Bill of particulars. |
| 154. Pleadings which have been held sufficiently specific. | 162. Allegation of damages under the statute. |
| 155. Pleadings which have been held not sufficiently specific. | 163. Special — Exemplary damages — In common-law actions. |
| 156. Injuries to person and property — Joinder of causes of action — Husband and wife. | 164. General denial — Plea — Answer — Contributory negligence. |
| 157. Pleadings in actions against municipal corporations — Notice. | 165. Special pleas — Release — Statute of Limitations. |
| | 166. Demurrers. |
| | 167. Miscellaneous forms of complaints, declarations and petitions in the reports — For complete forms see chapter "Forms." |

§ 149. Pleadings in general.— Many of the States have adopted a Civil Code of Procedure, in which the remedy to redress personal wrongs is designated simply a "civil action,"¹ the common-law forms of action and pleadings having been abolished. In such States the pleadings in which the cause of action and defense are stated, are usually styled a complaint and answer, instead of a declaration and plea as at common law. In Missouri² and Texas,³ the pleadings are styled a peti-

¹ See § 89.

Kentucky: Thomas v. Royster,

² Missouri: Rev. Stats. 1889, §§ 2039, 2041.

Louisiana: Erslew v. New Or-

³ Texas: Rev. Stats. 1887, § 1187. So in

leans &c. R. R. Co., 49 La. Ann. 86 (1897).

tion and answer. Many of the States still adhere to the common-law forms of pleadings — the declaration and plea — and under the liberal practice allowed by statute in amending the pleadings, the common-law system of pleading, as now used, is no more technical than under the Code. When the action is brought to recover damages for causing the death of a human being by the neglect or default of another person or corporation, the same style of action and form of pleadings are used as in actions brought to redress personal injuries. In the State of Maryland the statute provides that the action “shall be brought by and in the name of the State of Maryland, for the use of the person entitled to damages.”⁴ In the States of Maine⁵ and Massachusetts,⁶ the statutes provide a remedy by indictment, when the life of a person is lost by the negligence or carelessness of a railroad corporation. In actions brought to recover damages for personal injuries caused by negligence, or for causing the death of a human being, it matters little whether the pleading in which the cause of action is stated is called a complaint, petition, declaration or indictment, except so far as relates to their formal parts, as the principal point in this class of cases is to state *facts, and such facts only* as constitute a cause of action showing negligence or default in the performance of a legal duty.⁷ What would be sufficient under one system of pleading would necessarily be sufficient under the other, varied in the formal parts so as to conform to local statutes and practice.

§ 150. **Requisites in pleading a cause of action in accident cases.**— The pleading in which the cause of action is stated for the recovery of damages for personal injuries or for causing the death of a human being by negligence, whether it is a

Nebraska: *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (1895). Hampshire. *State v. Manchester &c. R. R. Co.*, 52 N. H. 528 (1873).

Ohio: *Hesse v. Columbus &c. R. R. Co.*, 58 Ohio St. 167 (1898).

⁴ Maryland: Pub. Gen. Laws, art. 67, § 2.

⁵ Maine: Rev. Stats. 1883, chap. 51, § 68.

⁶ Massachusetts: Pub. Stats. 1882, chap. 112, § 212. This was formerly so by statute in New

⁷ While mere abstract conclusions of law cannot be pleaded, yet allegations which combine the elements of such conclusions, and also of facts, are admissible in pleading. *Grindle v. Milwaukee &c. R. R. Co.*, 42 Iowa, 376 (1876). See 2 Thomp. on Neg. 1246 1248, 1254; Thomas on Neg. 1045.

complaint, petition, declaration or indictment, should contain and state with precision: *First*. An allegation or statement of the facts and circumstances from which it is shown that the defendant owed a legal duty to the plaintiff. An allegation of a duty standing alone is insufficient.⁸ That the act of the defendant complained of was negligent in character, in that the defendant negligently performed, or failed to perform, the duty he owed to the plaintiff; that such negligent act of the defendant was the cause of the plaintiff's injury and damage as its natural and proximate result.⁹ *Second*. That the plaintiff's injury was caused without fault or negligence on his part.¹⁰ *Third*. A statement of facts from which the extent and nature of the damage complained of is shown.¹¹ *Fourth*. In actions

⁸ The allegation of a duty standing alone will not sustain or aid a pleading; the sufficiency of the pleading or declaration must be determined upon the facts from which the duty is deduced. *Marvin Safe Co. v. Ward*, 17 Vr. 19 (1884); *Clyne v. Helmes*, 32 Vr. 358 (1898); *Chicago &c. R. R. Co. v. Clausen*, 173 Ill. 100 (1898). An allegation of duty, in words, is always surplusage; if the facts stated raise the duty, the allegation is unnecessary; if they do not, it is unavailing. *Gibson v. Leonard*, 37 Ill. App. 344, 349 (1890); *Angus v. Lee*, 40 id. 304 (1890); *Seymour v. Maddox*, 16 Ad. & El. (N. S.) 326 (1851). Whether, upon the facts stated, the defendant owed any duty to the plaintiff is a question of law; whether they were proved would be a question for the jury. *Gibson v. Leonard*, 37 Ill. App. 344, 349 (1890). The pleader must state facts from which the law will raise a duty and show an omission of duty and resulting injury; but when that is done, an allegation that the act was negligent is unnecessary. *Taylor v. Felsing*, 164 Ill. 331 (1896).

A declaration for wrongfully and negligently killing the deceased, without stating the facts constituting the negligence, was held bad on demurrer, in *Cotton Oil Co. v. Shamblin*, 101 Tenn. 263 (1898).

⁹ To sustain a recovery there must be in every instance a connection between the wrong and the injury, facts must be pleaded which show the connection between the negligent wrong and its consequences. Mere conclusions will not suffice. *Harris v. Board of Commissioners, Ind.*, Dec. 14, 1889; 23 N. E. Rep. 92; *Parker v. Providence &c. Steamboat Co.*, 17 R. I. 376 (1891).

¹⁰ See § 153. In many of the States the absence of such an allegation has been held not to be fatal. But in a few of the States the absence of such an allegation has been held fatal on demurrer. *Ib.*

¹¹ *Chiles v. Drake*, 2 Metc. 146 (1859, Ky.). If defendant desired that the allegations should be more definite, it could have moved to have them, *i. e.*, the allegations of damages, made more specific or for a bill of particulars. *Ehrgott*

brought under the statute, for causing the death of a human being, an allegation of the existence of some person entitled to the benefit of the recovery under the statute.¹² When the action is brought in a different State from the one in which the death was caused, there must be an allegation in the pleading of the existence of a statute in that State giving a right of action for causing death of a human being. Such statute must be "substantially similar" to the statute of the State in which the action is brought.¹³ A declaration which states a cause of action so that it can be understood by the party who is to answer it, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment, and which distinctly sets forth when, where, in what manner and under what circumstances the plaintiff was injured by the defendant's default, negligence and improper conduct, is sufficient.¹⁴

v. Mayor &c. of New York, 96 N. Y. 264, 277 (1884). Special damages, *i. e.*, damages which the law does not necessarily imply that the plaintiff has sustained from the act complained of, must be distinctly averred in order to apprise the defendant of the nature of the claim. Tomlinson v. Town of Derby, 43 Conn. 562, 567 (1876).

¹² It is not necessary to set out the names of the beneficiaries. McGlove v. New Jersey &c. R. R. Co., 8 Vr. 304 (1875); Quincy Coal Co. v. Hood, 77 Ill. 68, 73 (1875); Conant v. Griffin, 48 id. 410 (1868); Jeffersonville &c. R. R. Co. v. Hendricks, 41 Ind. 48 (1872). Although it is customary to set forth the names. Under the Maine statute, which provides a procedure by indictment and forfeiture, their names must be stated. State v. Grand Trunk Ry. Co., 60 Me. 145 (1871). In Pennsylvania the statute provides that the declaration shall state who are the parties entitled to such action. 2 Brightly's

Purd. Dig., p. 1267, § 4. See §§ 109, 158.

¹³ See § 107.

¹⁴ McCoull v. City of Manchester, 85 Va. 579 (1888); Jones v. Old Dominion Cotton Mills, 82 id. 140 (1886). A declaration against a corporation need not allege affirmatively, by express averment, that the injury complained of was caused by the negligent act of agents or servants of the defendant who were not fellow servants of the defendant. The allegation that the defendant was negligent excludes *ex vi termini*, that the injury was caused by parties for whose conduct the defendant was not responsible. Libby v. Scherman, 146 Ill. 540 (1903); Hess v. Rosenthal, 160 id. 621 (1896). Under the Virginia Code, p. 1094, chap. 167, § 40, in an action against a railroad company, it is not necessary to aver in the declaration that it is a corporation, nor is it necessary to prove on the trial that the defendant is

§ 151. **A general averment of negligence is sufficient.**—A general averment of negligence is sufficient;¹⁵ the particular acts constituting the negligence need not be, in detail, specifically set out.¹⁶ But if the acts which constitute the negligence be

a corporation, unless with the plea there is filed an affidavit denying that it is. The court will *ex officio* take notice of the fact. *Baltimore &c. R. R. Co. v. Sherman*, 30 Gratt. 602 (1878). If the plaintiff sues by a name which imports a corporation it need not specially aver its corporate existence. *Holmes &c. Co. v. Commercial Nat. Bank*, 23 Colo. 210 (1896). Ordinances as to speed of trains need not be pleaded by the plaintiff, but are competent evidence going to prove negligence. *Faber v. St. Paul &c. Ry. Co.*, 29 Minn. 465 (1882). See *Lake Shore &c. R. R. Co. v. O'Conner*, 115 Ill. 254 (1885).

¹⁵ *Ohio &c. Ry. Co. v. Walker*, 113 Ind. 196, 200 (1887); *Mack v. St. Louis &c. Ry. Co.*, 77 Mo. 232 (1883); *Schneider v. Missouri Ry. Co.*, 75 id. 295 (1882); *St. Louis &c. Ry. Co. v. Mathias*, 50 Ind. 65 (1875); *Clark v. Chicago &c. R. R. Co.*, 15 Fed. Rep. 588 (1883); *Oldfield v. New York &c. R. R. Co.*, 14 N. Y. 310 (1856); *Grindle v. Milwaukee &c. R. R. Co.*, 42 Iowa, 376 (1876); *Chiles v. Drake*, 2 Metc. 146 (1859, Ky.); *Louisville &c. Ry. Co. v. Lynch*, 147 Ind. 165 (1896); *Thomas on Neg.* 1045, 1046. In Indiana it has been held, negligence in the complaint need not be distinguished as "ordinary" or "gross;" a charge of negligence is broad enough to admit proof of any and all degrees of negligence. *Pennsylvania Co. v. Krick*, 47 Ind. 369 (1874); *City of Fort Wayne v. De Witt*, id. 391 (1874); *Hildebrand v. Toledo &c. R. R. Co.*, id. 399 (1874); *Ohio &c. R. R. Co. v. Selby*, id. 471 (1874). So in Kentucky it

was held the degree of negligence, whether willful, gross or ordinary, need not be stated. It is a matter of proof and not of averment. *Louisville &c. R. R. Co. v. Mitchell*, 87 Ky. 327 (1888). It is not necessary to set out the evidential facts. *Chicago &c. R. R. Co. v. Kellogg*, Neb. (1898); 5 Am. Neg. Rep. 50, where some recent cases on pleading are collected.

¹⁶ *Clark v. Chicago &c. R. R. Co.*, 15 Fed. Rep. 588 (1883); *Mack v. St. Louis &c. Ry. Co.*, 77 Mo. 232 (1883); *Jones v. White*, 90 Ind. 255 (1883); *Pennsylvania Co. v. Dean*, 92 id. 459 (1883); *Ohio &c. R. R. Co. v. Selby*, 47 id. 471 (1874); *Lucas v. Wattles*, 49 Mich. 380 (1882); *Tierney v. Minneapolis &c. Ry. Co.*, 31 Minn. 234 (1883); *State v. Manchester &c. R. R. Co.*, 52 N. H. 528 (1873); *Chiles v. Drake*, 2 Metc. 146 (1859, Ky.); *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661 (1897). But the plaintiff must aver in what respect defendant was negligent. *Illinois Central R. R. Co. v. Weiland*, 179 Ill. 609 (1899). When the suit is by a servant seeking to recover damages for an injury, the pleadings should be more specific than when a passenger is seeking damages. *Clark v. Chicago &c. R. R. Co.*, 15 Fed. Rep. 588 (1883). Must allege in what capacity the plaintiff was employed, whether as a servant of the defendant, or the servant of an independent contractor, or as a licensee, or in some other capacity. *Boardman v. Creighton*, Me. ; 44 Atl. Rep. 721 (1899). A complaint is fatally defective which does not contain an averment that

specifically pleaded, no others can be proved.¹⁷ Thus, where the petition set forth that the plaintiff was injured through the negligence of a railroad company in "using defective machinery," and "in running its cars," etc., the evidence showed that a broken rail was the cause of the injury, it was held to be a fatal variance.¹⁸ So any degree of negligence may be proved under the general averment of negligence.¹⁹

§ 152. The real ground of complaint should be distinctly stated.

— The real ground of complaint constituting the negligence which caused the injury should be clearly and distinctly stated.²⁰ Thus, where the negligence consists in having a defective sand-box on the engine and in keeping a defective frog in the track, the petition should not charge negligence in the running of the cars.²¹ The act complained of must be pleaded as the cause of action. To permit a recovery upon an act not pleaded, but incidentally revealed, would be obviously unfair.²² It has been

the plaintiff was ignorant of the delinquencies of a fellow servant, so a complaint must aver the practicability of additional appliances for the safety of employes, and that the plaintiff, at the time of the injury, was ignorant of the dangers to which he was exposed. *Peterson v. New Pittsburg &c. Co.*, 149 Ind. 260 (1897).

¹⁷ *Schneider v. Missouri Ry. Co.*, 75 Mo. 295 (1882); *Batterson v. Chicago &c. Ry. Co.*, 49 Mich. 184 (1882); *Straight v. Odell*, 13 Ill. App. 232 (1882); *Springfield City Ry. Co. v. De Camp*, 11 id. 475 (1882); *Haynie v. Chicago &c. R. R. Co.*, 9 id. 105 (1881); *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661 (1897).

¹⁸ *Waldhier v. Hannibal &c. R. R. Co.*, 71 Mo. 514 (1880).

¹⁹ *Keating v. Detroit &c. R. R. Co.*, 104 Mich. 418 (1895).

²⁰ *Edens v. Hannibal &c. R. R. Co.*, 72 Mo. 212 (1880); *Waldhier v. Hannibal &c. R. R. Co.*, 71 id. 514 (1880); *Heilner v. Union County*, 7 Or. 83 (1879).

²¹ *Edens v. Hannibal &c. R. R. Co.*, 72 Mo. 212 (1880). See *Gillett v. Detroit Board of Trade*, 46 Mich. 309 (1881).

²² *Georgia &c. R. R. Co. v. Oaks*, 52 Ga. 410, 416 (1874). Especially so if introduced by way of defense. *Ib.* *Pierce v. Great Falls &c. R. R. Co.*, Mont. ; 6 Am. Neg. Rep. 109 (1899). "A general allegation of negligence is sufficient to repel a demurrer for want of facts. This means, not that the pleading is good by charging that the plaintiff was injured 'by the negligence of the defendant,' but that it is sufficient if the act stated as the cause of the injury is alleged to have been 'negligently' done. If the pleader goes beyond this general allegation, and sets forth the specific facts that he claims made the act causing the injury negligent, the specific averments may overbear the general, and render the pleading obnoxious on demurrer. A defendant is entitled to a statement of the specific

held that a charge of willful injury is not sustained by evidence of mere negligence;²³ nor can proof of willful injury be made under a charge of negligence merely.²⁴

§ 153. **Allegation that plaintiff is free from contributory negligence.**—In setting out the facts in a declaration, complaint or petition, which constitute a cause of action, showing negligence on the part of the defendant, it is the better practice to allege that the injury occurred without any fault, carelessness or negligence on the part of the plaintiff, though in many of the States the absence of such an allegation has been held not to be fatal,²⁵ negligence on the part of the plaintiff being a matter

facts, but, if the complaint does not contain it, his remedy is by motion." Baker, J., in *Cleveland &c. Ry. Co. v. Berry*, Ind. 6 Am. Neg. Rep. 45 (1899).

²³ *Highland Ave. &c. R. R. Co. v. Winn*, 93 Ala. 306 (1890); *Louisville &c. R. R. Co. v. Hurt*, 101 id. 34 (1892); *Indiana &c. Ry. Co. v. Overton*, 117 Ind. 253 (1888); *Indiana &c. Ry. Co. v. Burdge*, 94 id. 46 (1883).

²⁴ *Pennsylvania Co. v. Smith*, 98 Ind. 42 (1884). *Contra* in Alabama, where it was held by the Supreme Court of that State that evidence of reckless, wanton or willful negligence can be introduced on the trial if a cause in which the complaint avers only simple negligence. *Louisville &c. R. R. Co. v. Hurt*, 101 Ala. 34 (1892).

²⁵ United States courts: *Conroy v. Oregon Construction Co.*, 23 Fed. Rep. 71 (1885); *Watkins v. Southern Pac. R. R. Co.*, 38 id. 711 (1889).

Alabama: *Holt v. Whatley*, 51 Ala. 569 (1874); *Government Street R. R. Co. v. Hanlon*, 53 id. 70 (1875).

Arizona: *Lopez v. Central Arizona Mining Co.*, 1 Ariz. 464 (1883).

Colorado: See *Wilson v. Denver &c. R. R. Co.*, 7 Colo. 101 (1883).

Illinois: *Chicago &c. R. R. Co. v. Coss*, 73 Ill. 394 (1874); *Consolidated Coal Co. v. Wombacher*, 134 id. 57 (1890); *Illinois Central R. Co. v. Weiland*, 179 id. 609 (1899).

Kansas: *Missouri Pac. Ry. Co. v. McCally*, 41 Kan. 639 (1889).

Massachusetts: *May v. Inhabitants of Princeton*, 11 Metc. 442 (1846).

Minnesota: *Thompson v. Great Northern Ry. Co.*, 70 Minn. 219 (1897); *Hocum v. Weitherick*, 22 id. 152 (1875).

Mississippi: *Meyer v. King*, 72 Miss. 1 (1894).

Missouri: *Hudson v. Wabash &c. Ry. Co.*, 101 Mo. 13 (1890).

New Jersey: *Falk v. New York &c. R. R. Co.*, 27 Vr. 384 (1894). Not necessary to allege that plaintiff is free from contributory negligence.

New York: *Lee v. Troy Citizens Gas Light Co.*, 98 N. Y. 115 (1885); *Urquhart v. City of Ogdensburg*, 23 Hun. 75 (1880).

Ohio: *Street R. R. Co. v. Nolt-henius*, 40 Ohio St. 376 (1883).

Rhode Island: *Lee v. Union R. R. Co.*, 12 R. I. 383 (1877).

South Carolina: *Crouch v. Charleston &c. Ry. Co.*, 21 So. Car. 495 (1884).

of defense. But in some of the States the absence of such an allegation has been held fatal on demurrer.²⁶

Texas: *Texas &c. Ry. Co. v. Murphy*, 46 Tex. 356 (1876).

Virginia: *Baltimore &c. R. R. Co. v. Whittington*, 30 Gratt. 805 (1878).

West Virginia: *Snyder v. Pittsburgh &c. Ry. Co.*, 11 W. Va. 14 (1877); *Fowler v. Baltimore &c. R. R. Co.*, 18 id. 579 (1881).

Wisconsin: *Hoth v. Peters*, 55 Wis. 405 (1882). See *Kelley v. Chicago &c. Ry. Co.*, 50 id. 381 (1880); 2 *Thomp. Neg.* 1178, n.

²⁶ Illinois: *Gerke v. Fancher*, 158 Ill. 375 (1895); *Calumet Iron &c. Co. v. Martin*, 115 id. 368 (1885); *Chicago &c. R. R. Co. v. Hazzard*, 26 id. 373 (1861). See Illinois cases, *contra*, cited in previous note No. 25.

Indiana: *Jackson v. Indianapolis &c. R. R. Co.*, 47 Ind. 454 (1874); *Hildebrand v. Toledo &c. Ry. Co.*, id. 399 (1874); *City of Fort Wayne v. De Witt*, id. 391 (1874); *Kessler v. Leeds*, 51 id. 212 (1875); *Louisville &c. Ry. Co. v. Boland*, 53 id. 398 (1876); *Sullivan v. Toledo &c. Ry. Co.*, 58 id. 26 (1877); *Cincinnati &c. R. R. Co. v. Peters*, 80 id. 168 (1881); *Wilson v. Trafalgar &c. Gravel Road Co.*, 83 id. 326 (1882). *Contra*, *Indianapolis &c. R. R. Co. v. Paramore*, 31 Ind. 143 (1869). An express averment not necessary may appear from the facts stated. *Benford &c. R. R. Co. v. Rainbolt*, 99 Ind. 551 (1884). In a suit by an administrator, the complaint need not negative contributory negligence of the administrator. *Indiana Mfg. Co. v. Millican*, 87 Ind. 87 (1882). Contributory negligence need not be denied when, from the facts stated, it is

evident that there was no such fault. *Duffy v. Howard*, 77 Ind. 182 (1881). "Without any fault, carelessness or negligence on plaintiff's part" is a sufficient allegation to negative contributory negligence. *City of Fort Wayne v. De Witt*, 47 Ind. 391 (1874); *Cincinnati &c. R. R. Co. v. Chester*, 57 id. 297 (1877); *City of Anderson v. Hervey*, 67 id. 420 (1879); *City of Huntington v. Breen*, 77 id. 29 (1881); *Wilson v. Trafalgar &c. Gravel Road Co.*, 83 id. 326 (1882); *Rogers v. Overton*, 87 id. 410 (1882); *Gheens v. Golden*, 90 id. 427 (1883). Unless the facts alleged in the pleading do not necessarily raise an inference of contributory fault. *Evansville &c. R. R. Co. v. Krapf*, 143 Ind. 647 (1895).

Kentucky: A declaration is sufficient if it denies generally contributory negligence, though not the particular facts alleged to show it. *Louisville &c. R. R. Co. v. Wolfe*, 80 Ky. 82 (1882).

Maine: For the use of defective tools by servant the declaration is bad if it does not allege that defect was unknown to plaintiff. *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113 (1861).

Maryland: Under art. 75, § 23, Form 36. *State v. Baltimore &c. R. R. Co.*, 77 Md. 489 (1893).

Massachusetts: Under Stats. of 1874, chap. 372, § 164. *Fuller v. Boston &c. R. R. Co.*, 133 Mass. 491 (1882).

Michigan: *Thompson v. Flint &c. Ry. Co.*, 57 Mich. 300 (1885).

Montana: *Kennon v. Gilmer*, 4 Mont. 433 (1882).

§ 154. Pleadings which have been held sufficiently specific.—

Thus, in a suit to recover damages for an injury occurring at a railroad crossing, an averment that the defendant negligently and carelessly drove a certain locomotive upon the railroad, up to, upon, and across, a certain public highway, at the crossing of the same, and the said railroad company, without giving the necessary statutory signals, viz., ringing a bell or sounding a whistle, held, a sufficiently specific averment of defendant's negligence.²⁷ So a complaint which alleged that the defendant, "by the culpable carelessness, negligence, unskillfulness and mismanagement of said defendants and their employes, wrongfully ran a locomotive, with a train of cars attached thereto," against plaintiff's horses and wagon while lawfully travelling along the public highway, was held sufficient.²⁸ An averment that the engineer so recklessly, negligently and unskillfully managed the engine and boilers that one of them exploded, and the plaintiff's intestate was thereby killed, was held sufficient on demurrer.²⁹ A complaint, in an action for damages for an injury to the person, is sufficiently certain and particular in allegations of the act of negligence when, from the averments, it may be understood that the plaintiff was passing on the foot crossing of a public street in a city, and the defendant, without any negligence on the part of the plaintiff, carelessly and negligently drove his wagon against the plaintiff, thereby injuring him.³⁰ The complaint averred that the defendant, a railroad company, did not use due care, diligence and skill in carrying the plaintiff. But, on the contrary, the track of the railroad was in bad condition and repair, and the defendant, by its servants, etc., negligently, unskillfully and carelessly ran its trains of cars, whereby, etc. It was held, on demurrer, that the averment of the condition of the track was not too general.³¹ Where a

²⁷ Chicago &c. Ry. Co. v. Miller, 46 Mich. 532 (1881); Thomas on Neg. 1046.

²⁸ Clark v. Chicago &c. Ry. Co., 23 Minn. 69 (1881). See Johnson v. St. Paul &c. R. R. Co., 31 id. 233 (1882).

²⁹ Fitts v. Waldeck, 51 Wis. 567 (1881).

³⁰ Kessler v. Leeds, 51 Ind. 212 (1875).

³¹ Ohio &c. R. R. Co. v. Selby,

47 Ind. 471 (1874). In construing a complaint against a railroad company for injuries received by the plaintiff, while in the employment of the defendant and engaged in coupling cars, a general introductory statement that the cars were unfit for the transportation of rails, was held to be controlled by specific statements of facts showing that the injury was caused by the manner in which the cars were

petition for damages against a railroad company, on account of the negligence of a servant — a switchman — of the company in leaving a rail so that it caused injury to the plaintiff, alleged that the defendant negligently and carelessly permitted the rail to remain so near the track as to be dangerous, but did not allege that the defendant had knowledge that the rail was there, held, the allegation was sufficient.³²

§ 155. Pleadings which have been held not sufficiently specific.

— In order that there may be a recovery by an administratrix for the killing of her intestate through the falling of a building by negligence in the construction thereof, the declaration must show that the alleged superintendent had *exclusive* control in the furnishing of the materials and in the erection of the building.³³ In an action against a railroad company for the killing of plaintiff's intestate, the declaration alleged that the defendant "carelessly and improperly drove and managed its engines and cars," etc.; held, the declaration should have contained a more specific allegation as to wherein the carelessness and improper conduct of the company consisted, and was, therefore, demurrable.³⁴ An allegation in a petition that a work was done "so recklessly, carelessly and wantonly, and with such indifference to the rights of others," that a person was killed, is not a full equivalent to a charge that the life was lost by the willful neglect of the person doing the work, as required by the statute.³⁵

loaded with rails. Indianapolis &c. Ry. Co. v. Johnson, 102 Ind. 352 (1885).

³² Hall v. Missouri Pacific Ry. Co., 74 Mo. 298 (1881). So where the complaint alleged that the "draw-bars" of the coupling appliances of two cars "were not properly fastened, and were loose, defective and insufficient, and on account thereof would not and did not remain in their proper places when said cars were drawn together, as was usual and necessary in making said coupling," etc., was held sufficient. Tierney v. Minneapolis &c. Ry. Co., 31 Minn. 234 (1883).

³³ Hollenbeck v. Winnebago County, 95 Ill. 148 (1880). In such case an allegation that the defendants "were possessed and had the supervision and control of a certain building," which was then "being erected" for a courthouse, etc., held to be insufficient on that point. Dickey, J., dissenting; Thomas on Neg. 1045.

³⁴ Chicago &c. R. R. Co. v. Harwood, 90 Ill. 425 (1873).

³⁵ City of Lexington v. Lewis, 10 Bush, 677 (1874). Requisites of a petition in an action under Kentucky Act of 1854, 2 Stant. Stats. 510.

§ 156. **Injuries to person and property — Joinder of causes of action — Husband and wife.**—The Supreme Court of Illinois held that an action to recover damages to the person of the plaintiff, and an action to recover damages to his horse, buggy and harness, caused at the same time and by the same negligent act of the defendant, could be joined in the same count of the declaration.³⁶ In that case it was said that it is conceded that a recovery for damages to the person, and to the property of the plaintiff, might be had in the same action, if declared for in separate counts of the declaration.³⁷ The general rule of the common law is, that where several causes of action of the same nature — that is, which require at the common law the same judgment, and are recoverable in the same form of action — exist between the same parties in the same right, they may all be joined by several counts in one declaration.³⁸ It is not permissible to unite in one count several torts, constituting distinct and separate causes of action.³⁹ In actions brought by husband and wife for injuries to the wife, in which the husband joins his cause of action for the indirect damage to himself under the statute, it is the better practice for the husband to present his claim by a separate count, designating the damages sought by him. The verdict should assess the damages on each claim, and the judgment should distinguish them accordingly.⁴⁰

§ 157. **Pleadings in actions against municipal corporations — Notice.**—In a statutory action the plaintiff must bring himself within the statutory requirements necessary to confer the right of action, and these requirements must be alleged in the pleading setting out the cause of action.⁴¹ The legislature has the power to attach conditions to the maintenance of a common-law action as well as one created by statute,⁴² so that when the

³⁶ *Chicago &c. Ry. Co. v. Ingraham*, 131 Ill. 659 (1890). *Masters v. Town of Warren*, 27 Conn. 293 (1858); Gould Pl., chap.

³⁷ *Chicago &c. Ry. Co. v. Ingraham*, 131 Ill. 659, 664 (1890). *4, §§ 79, 85, 103; Chit. Pl. 228.*

³⁹ *Alabama &c. R. R. Co. v. Shakan*, 116 Ala. 302 (1896).

⁴⁰ *Consolidated Traction Co. v. Whelan*, 31 Vr. 154 (1897).

⁴¹ *Baker v. Hannibal &c. R. R. Co.*, 91 Mo. 86 (1886).

⁴² *Reining v. City of Buffalo*, 102 N. Y. 308 (1886).

³⁸ *Chicago &c. Ry. Co. v. Ingraham*, 131 Ill. 659, 664 (1890);

statute requires that notice shall be given to a municipality, or the filing of the claim as a condition precedent to the bringing of the action for injuries, a compliance with such conditions must be alleged in the pleading, otherwise the absence of such allegations will be fatal on demurrer.⁴³ Thus, in a complaint against a city for an injury caused by an obstruction in a street, it is not enough to allege that the city had negligently left the obstruction in the street, but it must also appear that it had notice of the obstruction, or that it ought to have had such notice.⁴⁴

§ 158. **Actions for causing death — Existence of beneficiaries must be alleged.**— All the cases hold that it is necessary to allege in the complaint, declaration or petition, in an action for causing the death of a human being by negligence, that the deceased left surviving some person entitled to the benefit of the action, *i. e.*, the existence of beneficiaries under the statute.⁴⁵ The

⁴³ *Wentworth v. Town of Sun-* nit, 60 Wis. 28 (1884); *Reining v. City of Buffalo*, 102 N. Y. 308 (1886); *City of Madison v. Baker*, 103 Ind. 41 (1885); *Turner v. City of Indianapolis*, 96 id. 51 (1884). In some of the States the statute does not require notice, in which case the plaintiff is not required to allege or prove that the defendant had notice of the defect. *Chapman v. Milton*, 31 W. Va. 384 (1888); *Evans v. City of Huntington*, 37 id. 601 (1893); *Raasch v. Dodge County*, 43 Neb. 508 (1895).

⁴⁴ *Turner v. City of Indianapolis*, 96 Ind. 51 (1884); *Town of Rushville v. Poe*, 85 id. 83 (1882); *City of Madison v. Baker*, 103 id. 41 (1885); *Worster v. Proprietors of Canal Bridge*, 16 Pick. 541 (1835); *Dillon on Mun. Corp.* (2d ed.), § 790.

⁴⁵ *Tiffany on Death by Wrongful Act*, §§ 80, 182; *Geroux v. Graves*, 62 Vt. 280 (1890); *Westcott v. Central Vt. R. R. Co.*, 61 id. 438 (1889); *Burlington &c. R. R. Co.*

v. Crockett, 17 Neb. 570 (1885); *Wiltse v. Town of Tilden*, 77 Wis. 152 (1890); *Serensen v. Northern Pac. R. R. Co.*, 45 Fed. Rep. 407 (1891); *Lamphear v. Buckingham*, 33 Conn. 237 (1866); *Quincy Coal Co. v. Hood*, 77 Ill. 68 (1875); *Missouri Pac. Ry. Co. v. Barber*, 44 Kan. 612 (1890); *Stewart v. Terre Haute &c. R. R. Co.*, 103 Ind. 44 (1885); *Clore v. McIntire*, 120 id. 262 (1889). A complaint which states the names of the next of kin, and how they were related to the deceased, with an allegation of damage to them, is sufficient, as far as pleading the damage. *Barnum v. Chicago &c. Ry. Co.*, 30 Minn. 461 (1883); *McGlone v. New Jersey &c. R. R. Co.*, 8 Vr. 304 (1875); *Jeffersonville &c. R. R. Co. v. Hendricks*, 41 Ind. 48 (1872); *Holton v. Daly*, 106 Ill. 131, 138 (1882); *Conant v. Griffin*, 48 id. 410 (1868); *City of Friend v. Burleigh*, 53 Neb. 674 (1898). *Contra* under Act of Feb. 3, 1875, § 1; Act of March 6, 1883, inapplicable. Little

rule is the same where the remedy is by indictment,⁴⁶ or where the action is brought in the name of the State, as in Maryland.⁴⁷ It is not necessary to state the names of the beneficiaries,⁴⁸ although it is customary to set forth the names. In Maine, where the proceeding is by indictment and the forfeiture is payable directly to the beneficiaries and not to the administrator, their names must be stated.⁴⁹ In Pennsylvania the statute provides that the declaration shall state who are the parties entitled to such action.⁵⁰ In an action by a mother under a statute authorizing her, if the father be dead, to sue for the death of a minor child, the complaint must aver that the father is dead.⁵¹ An allegation that the plaintiff is a widow is not sufficient.⁵²

Rock &c. Ry. Co. v. Townsend, 41 Ark. 382 (1883); *Columbus &c. Ry. Co. v. Bradford*, 86 Ala. 574 (1888); *Alabama &c. R. R. Co. v. Waller*, 48 Ala. 459 (1872). Under chap. 145, §§ 7-9, Code 1873 of Va., it is not necessary to aver in the declaration for whose benefit the action is brought. *Baltimore &c. R. R. Co. v. Wightman*, 29 Gratt. 431 (1877); *Matthews v. Warner*, id. 570 (1877). In an action by the representatives of the deceased, the declaration need not negative the existence of any relatives entitled to compensation other than those for whose behalf the action purports to be brought. *Barnes v. Ward*, 9 C. B. 392 (1850); 2 C. & K. 661.

⁴⁶ *Commonwealth v. Boston &c. R. R. Co.*, 11 Cush. 512 (1853); *Commonwealth v. Eastern R. R. Co.*, 5 Gray, 473 (1855); *Commonwealth v. Boston &c. R. R. Co.*, 121 Mass. 36 (1876); *State v. Grand Trunk Ry. Co.*, 60 Me. 145 (1871); *State v. Gilmore*, 24 N. H. 461 (1852). See *State v. Manchester &c. R. R. Co.*, 52 id. 528 (1873).

⁴⁷ See *State v. Baltimore &c. R. R. Co.*, 70 Md. 319 (1889).

⁴⁸ *McGlone v. New Jersey &c. R. R. Co.*, 8 Vr. 304 (1875); *Conant v. Griffin*, 48 Ill. 410 (1868); *Quincy Coal Co. v. Hood*, 77 id. 68 (1875); *Jeffersonville &c. R. R. Co. v. Hendricks*, 41 Ind. 48 (1872), overruling *Indianapolis &c. R. R. Co. v. Keely*, 23 id. 133 (1864); *Howard v. Delaware &c. Canal Co.*, 40 Fed. Rep. 195 (1889); *Harper v. Norfolk &c. R. R. Co.*, 36 id. 102 (1887); *O'Callaghan v. Bode*, 84 Cal. 489, 498 (1890); *Barnes v. Ward*, 9 C. B. 392 (1850); 2 C. & K. 661. Nor the ages and residences of the beneficiaries, and the extent of their dependence on the deceased, need not be averred in the declaration; if these facts are necessary to the defense the court can order a specification. *Westcott v. Central Vt. R. R. Co.*, 61 Vt. 438 (1889).

⁴⁹ *State v. Grand Trunk Ry. Co.*, 60 Me. 145 (1871).

⁵⁰ 2 Brightly's *Purd. Dig.* (Pa.), p. 1267, § 4.

⁵¹ *David v. Waters*, 11 Or. 448 (1884). "Next of kin" must mean nearest in relationship.

⁵² *St. Louis &c. Ry. Co. v. Yocum*, 34 Ark. 493 (1879).

There must be an allegation of the fact of death.⁵³ Under the Missouri statute, which gives a cause of action to the parent of a minor for causing the minor's death by negligence when the minor is unmarried, the fact that the minor is unmarried is jurisdictional and must be alleged in the petition and proved.⁵⁴ It is not necessary to allege that the act or neglect of the defendant was such that if death had not ensued the person injured might have maintained an action.⁵⁵ Nor is it necessary that the plaintiff should allege that the action has been brought in due time, although the statute under which the action is brought contains the limitation.⁵⁶

§ 159. Appointment of plaintiff as administrator or executor must be alleged.—The appointment of the plaintiff as administrator or executor must be alleged.⁵⁷ A copy of the letters is sometimes annexed to the pleading. The appointment of the administrator is not put in issue by a general denial; that issue must be raised by a special plea or denial.⁵⁸ So the revocation of the administrator's authority to sue must be specially pleaded.⁵⁹

§ 160. Action based on a foreign statute — Such statute must be alleged.—When the action is based upon a foreign statute, *i. e.*, where the action is brought in one State and the injury

⁵³ *Conant v. Griffin*, 48 Ill. 410 (1868).

⁵⁴ See *Barker v. Hannibal & Co. R. Co.*, 91 Mo. 86 (1886). In a statutory action the person suing must bring himself within the statutory requirements necessary to confer the right of action, and this must appear in the petition, otherwise it will show no cause of action. See *Baird v. Citizens Ry. Co.*, 146 Mo. 265 (1898).

⁵⁵ *Philadelphia & Co. R. R. Co. v. State*, 58 Md. 372 (1882).

⁵⁶ *Chiles v. Drake*, 2 Metc. 146 (1859, Ky.).

⁵⁷ *Louisville & Co. R. R. Co. v. Trammell*, 93 Ala. 350 (1890); *Bowler v. Lane*, 3 Metc. 311 (Ky. 1860); *City of Atchison v. Twine*, 9 Kan. 350 (1872). It is sufficient to aver

the facts constituting the administrator's appointment under a petition for letters to the Superior Court by an order duly given and made, and his qualification and the issuance of letters under such appointment without averring the facts giving jurisdiction to the Superior Court. *Munro v. Pacific & Co.*, 84 Cal. 515 (1890). So, where the plaintiff sues as administratrix and refers to the deceased as "plaintiff's intestate," it is sufficient. *Louisville & Co. R. R. Co. v. Trammell*, 93 Ala. 350 (1890).

⁵⁸ *Ewen v. Chicago & Co. Ry. Co.*, 38 Wis. 613 (1875); *Union Ry. & Co. v. Shacklett*, 119 Ill. 232 (1887).

⁵⁹ *Burlington & Co. R. R. Co. v. Crockett*, 17 Neb. 570 (1885).

and death occurred in another State, the statute of such other State must be alleged and proved.⁶⁰ When a count attempts to declare upon the laws of a foreign country, it is fatally defective, unless those laws and also the facts are set forth so specifically that the court can see that the defendant owed a duty to the plaintiff, and had fallen short of that duty, and therefrom the plaintiff's injury resulted.⁶¹ If the declaration fails to allege the foreign statute, an amendment alleging it may be allowed,⁶² although the period of limitation prescribed by the foreign statute has elapsed.⁶³

⁶⁰ *Debevoise v. New York &c. R. R. Co.*, 98 N. Y. 377 (1885); *State v. Pittsburgh &c. R. R. Co.*, 45 Md. 41 (1876). And the allegation must be that the laws of such State are *similar* to the Georgia statute in relation to the injury complained of. *Selma &c. R. R. Co. v. Lacy*, 43 Ga. 461 (1871); *Hyde v. Wabash &c. Ry. Co.*, 61 Iowa, 441 (1883); *Chicago &c. R. R. Co. v. Schroeder*, 18 Ill. App. 328 (1885); *Nashville &c. R. R. Co. v. Eakin*, 6 Coldw. 582 (1869); *Beach v. Bay State Steamboat Co.*, 30 Barb. 433 (1859); *Kahl v. Memphis &c. R. R. Co.*, 95 Ala. 337 (1891). But if the declaration or complaint sets out a good cause of action, according to the law of the forum, without alleging that the killing was in the State, the declaration or complaint will be held good, as setting out a cause of action arising within the State. *Hobbs v. Memphis &c. R. R. Co.*, 12 Heisk. 526 (1873). It is not necessary in such action for the *defendant* to allege that the wrong was committed in another State; it is for the plaintiff to allege and prove that the cause of action arose within the jurisdiction. *Debevoise v. New York &c. R. R. Co.*, 98 N. Y. 377 (1885).

⁶¹ *McLeod v. Connecticut &c. R. R. Co.*, 58 Vt. 727 (1886).

⁶² *Lustig v. New York &c. R. R. Co.*, 20 N. Y. Supp. 477 (1892). Such amendment is not open to the objection that it set up a new cause of action.

⁶³ The practice of the *lex fori* in respect to pleadings, amendments, and the general mode of procedure, will control, if it differs from the practice in the State where the cause of action arose. *South Carolina R. R. Co. v. Nix*, 68 Ga. 572 (1882). *Contra*, *Selma &c. R. R. Co. v. Lacy*, 49 Ga. 106 (1873), the mode of procedure in ascertaining the rights of the parties will be governed by the laws of the State in which the action is brought, but as to what are their rights must be determined by the laws of the State where the act complained of was done.

The law of another State, whether declared by judicial decisions or otherwise, if relied upon to defeat an action alleged to have accrued in that State and sought to be enforced here, must be pleaded and proved, as judicial notice thereof will not be taken for such purpose. *Cincinnati &c. R. R. Co. v. McMullen*, 117 Ind. 439 (1888). See *Lower v. Segal*, 30 Vr. 66 (1896).

§ 161. **Bill of particulars.**— Lord Campbell's Act provides, "that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."⁶⁴ Of like import is the provision in the Maryland statute.⁶⁵ In New Jersey the statute provides that "on request by the defendant or the defendant's attorney, the plaintiff on the record shall be required to deliver to the defendant, or to the defendant's attorney, a particular account, in writing, of the nature of the claim in respect to which damages shall be sought to be recovered."⁶⁶ In New York, a bill of particulars has been denied.⁶⁷ In Vermont, it was said that the court would order a bill of particulars.⁶⁸ The bill of particulars is intended for the same purpose as in other cases. It does not refer to the circumstances attending the death; that is not what is to be called for and given; the declaration gives that, but it is to be a statement of the particulars of the pecuniary loss sustained. The object of this provision is to enable the defendant to know in what way the damages are to be estimated, so that he may come prepared to meet that part of the case.⁶⁹

⁶⁴ England: 9 & 10 Vict., chap. 93, § 4.

New Brunswick: Cons. Stats., chap. 86, § 6.

Nova Scotia: Rev. Stats. 1884, chap. 116.

Ontario: Rev. Stats. 1887, chap. 135, § 6. Coleridge, J.: "But these words will be abundantly satisfied by a statement of the manner in which the pecuniary loss to the different persons for whom the action is brought is alleged to have arisen." Blake v. Midland Ry. Co., 18 Q. B. 93, 110 (1852); 18 Ad. & El. (N. S.) 93, 110.

⁶⁵ Pub. Gen. Laws, art. 67, § 3.

⁶⁶ Rev. 1878, p. 294, § 3; Gen. Stats. of N. J. (vol. 1), p. 1188. See

Telfer v. Northern R. R. Co., 1 Vr. 188, 200 (1862).

⁶⁷ Murphy v. Kipp, 1 Duer, 659 (1853). It would be unreasonable to require the plaintiff in such actions, to state by anticipation all the items, and the amount of each, that the court might hold would properly enter into the computation of damages.

⁶⁸ Westcott v. Central Vt. R. R. Co., 61 Vt. 438 (1889).

⁶⁹ Telfer v. Northern R. R. Co., 1 Vr. 188, 200 (1862). It is merely directory and not mandatory, and if the defendant files its pleas without demanding it, the right to it is waived. Philadelphia & C. R. R. Co. v. State, 58 Md. 372 (1882).

§ 162. *Allegation of damages under the statute.*—The cases are not in harmony on the point whether it is necessary to allege the facts showing pecuniary loss. This results from the construction placed upon the different statutes, some holding that pecuniary loss is implied by the death, to the beneficiaries, for which nominal damages, at least, may be recovered, while other courts hold that without pecuniary loss the action cannot be maintained for nominal damages. In Michigan and Wisconsin, it has been held that there must be alleged such facts from which it appears that there was, necessarily resulting from the death, pecuniary loss.⁷⁰ In Indiana, in an action by a father for the death of a minor child, it was held that, in order to recover full damages for the services of the child during his minority, or damages for the loss of future services, such damages must be specially averred and demanded in the complaint.⁷¹ So in California, it was held that damages for funeral expenses, if recoverable at all, must be specially alleged.⁷² In New York and Indiana, it has been held that there need be no allegation that damages have been sustained.⁷³ In such States which do not require an allegation of facts from which pecuniary loss is shown, it is sufficient to allege simply that the beneficiaries have sustained damages in a certain stated amount.⁷⁴ Chief Justice Beasley said that, under the New Jersey statute, it is proper, though perhaps not indispensable, to allege that such widow or next of kin has sustained some pecuniary loss.⁷⁵

⁷⁰ *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539 (1891); *Regan v. Chicago &c. Ry. Co.*, 51 Wis. 599 (1881); *Ewen v. Chicago &c. Ry. Co.*, 38 id. 613 (1875); *Kelley v. Chicago &c. Ry. Co.*, 50 id. 381 (1880). In Nebraska it is not absolutely necessary that the petition, for death based on the statute, contain the words "damage, injury or loss." *Kearney Electric Co. v. Laughlin*, 45 Neb. 390 (1895).

⁷¹ *Pennsylvania Co. v. Lilly*, 73 Ind. 252 (1881), citing *Gilligan v. New York &c. R. R. Co.*, 1 E. D. Smith, 453.

⁷² *Gay v. Winter*, 34 Cal. 153 (1867).

⁷³ Nominal damages. *Kenny v. New York &c. R. R. Co.*, 49 Hun, 533 (1888); *Safford v. Drew*, 3 Duer, 627 (1854); distinguished, *Korrady v. Lake Shore &c. Ry. Co.*, 131 Ind. 261 (1891).

⁷⁴ *Barnum v. Chicago &c. Ry. Co.*, 30 Minn. 461 (1883); *Louisville &c. Ry. Co. v. Buck*, 116 Ind. 566 (1888); *Westcott v. Central Vt. R. R. Co.*, 61 Vt. 438 (1889); *Barron v. Illinois Cent. R. R. Co.*, 1 Biss. 412 (1863); *Serensen v. Northern Pac. R. R. Co.*, 45 Fed. Rep. 407 (1891); *Chicago &c. Ry. Co. v. Carey*, 115 Ill. 115 (1885).

⁷⁵ *McGlone v. New Jersey &c. R. R. Co.*, 8 Vr. 304 (1875).

§ 163. **Special — Exemplary damages — In common-law actions.**—Special damage is that which the law does not necessarily imply, that the plaintiff has sustained from the act complained of, *i. e.*, when the consequences of an injury are peculiar to the circumstances and condition of the injured party, the law will not imply the damage simply from the act causing the injury. At common law such matter must be distinctly averred in the declaration in order to apprise the defendant of the nature of the claim.⁷⁶ In Connecticut the rule of the common law is adhered to closely.⁷⁷ Exemplary damages are not special damages and may be recovered, although not specially alleged or claimed in the complaint.⁷⁸ In Michigan it was held that loss of profits must be specially averred.⁷⁹

§ 164. **General denial — Plea — Answer — Contributory negligence.**—The general issue in this class of cases is “not guilty.”⁸⁰ A general denial of negligence, although not of the particular facts alleged, is sufficient.⁸¹ Under a general denial, the defendant may show that he was not negligent.⁸² The general rule is that contributory negligence on the part of the plaintiff is an admissible defense under the plea of general issue, which is not guilty.⁸³ A general averment of contributory

⁷⁶ See § 242; *Tomlinson v. Town of Derby*, 43 Conn. 562, 567 (1876); 1047.

Squier v. Gould, 14 Wend. 159 (1835).

⁷⁷ *Tomlinson v. Town of Derby*, 43 Conn. 562, 567 (1876). Injuries not specifically alleged may be shown if they resulted from such as are specified. *Manley v. Delaware &c. Canal Co.*, 69 Vt. 101 (1896).

⁷⁸ *Wilkinson v. Searcy*, 76 Ala. 176 (1884); *Alabama &c. R. R. Co. v. Arnold*, 84 id. 159 (1887). *Contra*, *Galveston &c. R. R. Co. v. Legierse*, 51 Tex. 189 (1879). Better practice is that they should be claimed by proper allegations, in the nature of distinct counts on different causes of action.

⁷⁹ *Silsby v. Michigan Car Co.*, 95

Mich. 204 (1893); *Thomas on Neg.*

⁸⁰ *Louisville &c. R. R. Co. v. Trammell*, 93 Ala. 350 (1890);

Holden v. Liverpool New Gas &c. Co., 3 C. B. 1 (1846); 3 M., G. & S. 1.

⁸¹ *Louisville &c. R. R. Co. v. Wolfe*, 80 Ky. 82 (1882).

⁸² *Kendig v. Overhulser*, 58 Iowa, 195 (1882); *Stevens v. Lafayette &c. Gravel Road Co.*, 99 Ind. 392 (1884). The plea of not guilty puts in issue the fact of there being a widow or next of kin surviving, as well as the commission of the act complained of. *Conant v. Griffin*, 48 Ill. 410 (1868).

⁸³ *Holden v. Liverpool New Gas &c. Co.*, 3 C. B. 1 (1846); 3 M., G. & S. 1.

negligence in an answer, without specifying the particular act, is sufficient.⁸⁴ In Missouri it was held that contributory negligence, being strictly an affirmative defense, in order to be availed of by the defendant as a matter of pleading, must be specially pleaded.⁸⁵ At common law, to a declaration in case, special pleas are not necessary, as all defenses may be made under the plea of not guilty.⁸⁶ The plea of the general issue puts in issue all the material allegations of the complaint and imposes upon the plaintiff the necessity of proving them.⁸⁷ In an action on the case, anything may be given in evidence, under the general issue, which destroys the right of action; hence a prior recovery by the plaintiff for the same cause of action may be given in evidence by the defendant, under the general issue.⁸⁸ So it is

⁸⁴ *Denver &c. R. R. Co. v. Smock*, 23 Colo. 456 (1897); *White v. City of Trinidad*, 10 Colo. App. 327 (1897). In Alabama it was held that a plea setting up the defense of contributory negligence, which does not aver the facts constituting the alleged contributory negligence, is insufficient and subject to demurrer. *Postal Telegraph Cable Co. v. Hulsey*, 115 Ala. 193 (1896).

⁸⁵ *Hudson v. Wabash &c. Ry. Co.*, 101 Mo. 13 (1890); *Keitel v. St. Louis &c. Ry. Co.*, 28 Mo. App. 657 (1888); *Stone v. Hunt*, 94 Mo. 475 (1887); *Hill v. Meyer Brothers Drug Co.*, 140 id. 433 (1897). So in Alabama, *Kansas City &c. R. R. Co. v. Crocker*, 95 Ala. 430 (1891), overruling *Government Street R. R. Co. v. Hanlon*, 53 id. 76 (1875); *North Carolina, Wallace v. Western R. R. Co.*, 104 No. Car. 442 (1889); *Jordan v. City of Ashville*, 112 id. 743 (1893). The plaintiff is not required to reply to the defendant's plea of contributory negligence. *Watkends v. Southern Pacific R. R. Co.*, 38 Fed. Rep. 711 (1889). In Kentucky contributory negligence is a defense which

must be affirmatively pleaded. *Favre v. Louisville &c. R. R. Co.*, 91 Ky. 541 (1891). See *Louisville &c. R. R. Co. v. Copas*, 95 id. 460 (1894).

⁸⁶ *East St. Louis &c. Ry. Co. v. Allen*, 54 Ill. App. 27 (1894).

⁸⁷ *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337 (1895). Whatever the plaintiff is required to prove to establish his cause of action, the defendant may disprove under a general denial. This is the general rule. *Clifford v. Damm*, 81 N. Y. 57. (1880) Under a plea of the general issue, the defense that a verified claim, under the Village Act of 1895, chap. 5, § 7, of Michigan, was not filed before commencing suit, may be raised. *Clark v. Village of Davison, Mich.* (1898); 5 Am. Neg. Rep. 43. But a plea of the general issue will not put in issue either the character in which the plaintiff sues or the character or capacity in which the defendant is sued. *McNulta v. Lockridge*, 137 Ill. 270 (1891).

⁸⁸ *Whitney v. Town of Clarendon*, 18 Vt. 252 (1846); *Barber v. Dixon*, 1 Wils. 45 (1743). If plaintiff improperly join two or more causes

competent to show, under a plea of general denial, that the servants operating the train when the injury occurred were not the servants of the company sued, but of a receiver operating the road under the decree of a court of competent jurisdiction.⁸⁹

§ 165. **Special pleas — Release — Statute of Limitations.**— At common law, in all actions of trespass to the person, matters in discharge of the action must be specially pleaded,⁹⁰ such as a release,⁹¹ or the Statute of Limitations.⁹² In speaking of the statutes which give a right of action to recover damages for causing the death of a human being, the United States Supreme Court said the liability and the remedy are created by the same statute, and the limitations of the remedy are, therefore, to be treated as limitations of the right. It is a condition attached to the right to sue at all.⁹³ The right is given subject to the limitation.⁹⁴ They are not strictly Statutes of Limitations;⁹⁵ and for this reason it has been held that these limitations need not be pleaded.⁹⁶ The rule is, that a statute which *bars the remedy only* must be pleaded, but a statute which *cuts off the right* need not be pleaded, but may be relied upon as a protec-

of action in the same count, such as damage to the person and property, the error will be one of pleading only, and under the general issue the defendant cannot object to the introduction of competent evidence to sustain the several causes of action. *Chicago & C. Ry. Co. v. Ingraham*, 131 Ill. 659 (1890).

⁸⁹ *Kansas & C. Ry. Co. v. Dorough*, 72 Tex. 108 (1888). Under the California Code of Civil Procedure, section 377, when one action for death has been brought, either by the heirs or by the personal representative of the deceased, in another action brought by either, the pendency of the prior action may be pleaded in abatement, or the judgment rendered therein may be pleaded in bar of the second action. *Munro v. Pacific Coast & C. Co.*, 84 Cal. 515 (1890).

⁹⁰ Chit. Pl. (vol. 1), § 496; *Bird v. Randall*, 3 Burr. 1353 (1762). See *Barber v. Dixon*, 1 Wils. 45 (1743).

⁹¹ *Bird v. Randall*, 3 Burr. 1353 (1762); *Parker v. Providence & C. Steamboat Co.*, 17 R. I. 376 (1891).

⁹² *Macfadzen v. Olvant*, 6 East, 387 (1805).

⁹³ *The Harrisburg*, 119 U. S. 199, 214 (1886).

⁹⁴ *Pittsburgh & C. Ry. Co. v. Hine*, 25 Ohio St. 629 (1874). The provision is a condition qualifying the right of action and not a mere limitation of the remedy.

⁹⁵ *Taylor v. Cranberry Iron & C. Co.*, 94 No. Car. 525 (1886).

⁹⁶ *Hanna v. Jeffersonville R. R. Co.*, 32 Ind. 113 (1869); *Jeffersonville & C. R. R. Co. v. Hendricks*, 41 id. 48 (1872).

tion if the facts appear.⁹⁷ They are not considered to be waived if not pleaded.⁹⁸ If the declaration or complaint shows that the action was not brought within the time limited, it is demurrable.⁹⁹ The appointment of an administrator is not brought in issue by a general denial, or a plea of the general issue; that issue must be raised by a special denial.¹ The general issue in no case puts in issue any fact, the burden of proving which, primarily, is not upon the plaintiff. An administrator's title to maintain the action can only be put in issue by a plea of "*ne unques administrator.*"² The plea of the general issue will not put in issue either the character in which the plaintiff sues or the character or capacity in which the defendant is sued;³ that can only be raised by a special plea. A plea in confession and avoidance, setting up accord and satisfaction of a claim for personal injuries, need not expressly confess defendant's negligence, it is sufficient if it impliedly or hypothetically does so.⁴ Misnomer of the plaintiff can only be pleaded in abatement.⁵

§ 166. **Demurrers.**— It is the settled rule that, by demurring to the evidence, the demurrant waives all evidence on his part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly deduced from the evidence, and refers it to the court to deduce all fair inferences from the evidence.⁶ When the declaration, petition or complaint shows that the plaintiff was guilty of contributory negligence, advantage may be taken

⁹⁷ Bomar v. Hayler, 7 Lea, 85, 89 (1889).

⁹⁸ Cooper v. Lyons, 9 Lea, 596, 601 (1882).

⁹⁹ George v. Chicago &c. R. R. Co., 51 Wis. 603 (1881); Hanna v. Jeffersonville R. R. Co., 32 Ind. 113 (1869).

¹ Ewen v. Chicago &c. Ry. Co., 38 Wis. 613 (1875); Union Ry. &c. Co. v. Shacklett, 119 Ill. 232 (1887); Louisville &c. R. R. Co. v. Trammell, 93 Ala. 350 (1890).

² Louisville &c. R. R. Co. v. Trammell, 93 Ala. 350 (1890).

³ McNulta v. Lockridge, 137 Ill. 270 (1891).

⁴ Snyder v. Witt, 99 Tenn. 618 (1897). Such as a satisfaction of a judgment for personal injury against one tort-feasor is a bar to an action against the other joint tort-feasor.

⁵ Springfield Consolidated Ry. Co. v. Hoeffner, 175 Ill. 634 (1898).

⁶ Trout v. Old Dominion Cotton Mills, 82 Va. 140 (1886); Trout v. Virginia &c. R. R. Co., 23 Gratt. 619 (1873); Baird v. Citizens Ry. Co., 146 Mo. 265 (1898). Plaintiff may demur to a plea of the Statute of Limitations, perfect in form. Chicago &c. Ry. Co. v. Gillison, 173 Ill. 264 (1898).

thereof by demurrer.⁷ So if the declaration or complaint, in an action brought under the statute for causing death, shows that the action was not brought within the time limited.⁸ By pleading the general issue, the defendant admits the sufficiency of the declaration, which he cannot afterwards question by motion to exclude the evidence under it. To question the sufficiency of a declaration, the defendant should demur to it or move in arrest of judgment.⁹

§ 167. Miscellaneous forms of complaints, declarations and petitions in the reports — For complete forms, see chapter "Forms."

— The forms referred to in the following citations are not all given in full. In some, the substance only is reported; in others, only a single count is given; but reference has been made to those only which would seem to be a guide or aid to the pleader in setting up a cause of action, with facts similar to the ones referred to: Form of a complaint where a passenger on a railroad train was injured;¹⁰ the same for putting a passenger off the train, thereby causing her to walk several miles, taking cold and suffering damages in consequence of the exposure.¹¹ Form of a declaration in tort for breach of duty as a

⁷ Favre v. Louisville &c. R. R. Co., 91 Ky. 541 (1891); Hoth v. Chester, 57 Ind. 297 (1877); Ellet Peters, 55 Wis. 405 (1882); Meyer v. St. Louis &c. Ry. Co., 76 Mo. v. King, 72 Miss. 1 (1879). See 518 (1882). The same where the Louisville &c. R. R. Co. v. passenger was injured while stepping from the train. Cincinnati &c. R. R. Co. v. Schmidt, 106 Ind. 73 (1885); Chicago &c. R. R. Co. v. Coss, 73 Ill. 394 (1874). *Contra*, Birmingham v. Duluth &c. Ry. Co., 70 Minn. 474 (1897).

⁸ George v. Chicago &c. R. R. Co., 51 Wis. 603 (1881); Hanna v. Jeffersonville R. R. Co., 32 Ind. 113 (1869).

⁹ Chicago &c. R. R. Co. v. Warner, 108 Ill. 538 (1884). See Camp v. Hall, 39 Fla. 535 (1897). A motion to dismiss because the plaintiff, by his pleadings, showed no good cause of action, may be made at any time. Maddox v. County of Randolph, 65 Ga. 216 (1880).

¹⁰ Cincinnati &c. R. R. Co. v. 168 (1881); Pennsylvania Co. v. Dean, 92 id. 459 (1883). The same where the passenger was traveling on a shipper's pass. Ohio &c. Ry. Co. v. Nickless, 71 Ind. 271 (1880). See *Nolton v. Western R. Co.*, 15 N. Y. 444 (1857). Declaration for negligently carrying and transporting goods on a steam vessel. Grill v. General Iron Screw Collier Co., L. R., 1 C. P. 600 (1866). The same for negligently carrying a horse. Austin v. Manchester &c. Ry. Co., 10 C. B. 474 (1850).

¹¹ Brown v. Chicago &c. Ry. Co., 54 Wis. 342 (1882).

common carrier.¹² Complaint in an action against a street railway company, injury to a trespassing child, sufficient averment of negligence.¹³ Where one is injured on a street of a city by a defective sidewalk.¹⁴ Where a traveller on a turnpike was injured by falling into a hole.¹⁵ Complaint for an injury caused by a defective street.¹⁶ A petition where the injury was caused by falling into a ditch.¹⁷ A declaration for allowing a wagon to obstruct a street, thereby causing injury.¹⁸ A complaint where one, while walking on the crossing of a street, was injured by being struck by a horse and wagon.¹⁹ A petition for an injury to a person on the street of a city by a locomotive.²⁰ Declaration where the injury was caused by a locomotive at a highway crossing.²¹ Declaration for negligently tearing down a house, injuring the adjoining property.²² A

¹² Jacksonville Street Ry. Co. v. Stratford, 25 U. C. C. P. 123 (1875). Chappell, 22 Fla. 616 (1886). The same for negligently leaving

¹³ Jefferson v. Birmingham &c. Electric Co., 116 Ala. 294 (1896). a horse and colt unattended in a street, injuring a child. Lynch v. Nurdin, 1 Q. B. 29 (1841).

¹⁴ Urquhart v. City of Ogdensburg, 23 Hun, 75 (1880); City of Washington v. Small, 86 Ind. 462 (1882); City of Fort Wayne v. De Witt, 47 id. 391 (1874). Declaration for the same. Hardy v. Keene, 52 N. H. 370 (1872). The same where injury was occasioned by a collision of two teams on a public highway. Park v. O'Brien, 23 Conn. 339 (1854); Drake v. Mount, 4 Vr. 441 (1867).

¹⁵ Jonesboro &c. Turnpike Co. v. Baldwin, 57 Ind. 86 (1877); Wilson v. Trafalgar &c. Gravel Road Co., 83 id. 326 (1882).

¹⁶ City of Madison v. Baker, 103 Ind. 41 (1885); Town of Rushville v. Poe, 85 id. 83 (1882); Turner v. City of Indianapolis, 96 id. 51 (1884). Allegation of notice essential.

¹⁷ Street R. R. Co. v. Nolt-henius, 40 Ohio St. 376 (1883). Declaration for the same. Clayards v. Dethick, 12 Q. B. 439 (1848).

¹⁸ Rounds v. Corporation of Where the excavation was made

¹⁹ Kessler v. Leeds, 51 Ind. 212 (1875). Declaration for the same. Cotton v. Wood, 8 C. B. (N. S.) 568 (1860); Mitchell v. Crassweller, 13 C. B. 237 (1853); S. C., 17 Jur. 716. Petition for the same. Pendleton Street Ry. Co. v. Shires, 18 Ohio St. 255 (1868).

²⁰ Otto v. St. Louis &c. Ry. Co., 12 Mo. App. 168 (1882). Complaint for the same. St. Louis &c. Ry. Co. v. Mathias, 50 Ind. 65 (1875).

²¹ Fuller v. Boston &c. R. R. Co., 133 Mass. 491 (1882); Wright v. Boston &c. R. R. Co., 129 id. 440 (1880). A complaint for the same. Pennsylvania Co. v. Krick, 47 Ind. 369 (1874).

²² Bradlee v. Christ Hospital, 4 M. & G. 714 (1842); S. C., 5 Scott N. R. 79; Davis v. London &c. Ry. Co., 2 id. 74 (1840); 1 M. & G. 799. Where the excavation caused a warehouse to fall. Mitchell v. Harper, 4 U. C. C. P. 147 (1854).

complaint in an action by an employe against a railroad company.²³ A declaration in an action against a railroad company for the killing of a child;²⁴ the same where a servant was killed by the falling of a building.²⁵ A declaration in an action to recover damages for the breaking of a crane and tackle, injuring the plaintiff, a servant, while unloading stone at a railroad station.²⁶ A complaint where a fireman was killed by the explosion of an engine.²⁷ Where a servant was injured while coupling cars;²⁸ the same where a servant was killed by the collision of two trains;²⁹ where a servant was injured by the breaking of a platform on which he was standing.³⁰ A declaration where a servant was injured by the fall of a bridge, which was over a deep excavation in a mine, while passing over the bridge.³¹ Complaint where a minor, an employe, was injured by the explosion of a steam boiler.³² A declaration where a girl at a ball was injured by eating unwholesome food, improperly and negligently prepared by the ca-

so near the street that plaintiff leaving the track. *Mobile &c. R. Co. v. Thomas*, 42 Ala. 672 (1868). For not providing a safe engine. *Walker v. McNeill*, 17 Wash. St. 582 (1897).
 fell into it and was injured. *Barnes v. Ward*, 9 C. B. 392 (1850); S. C., 2 C. & K. 661. Where rubbish was left in the highway, and plaintiff, in passing over the highway, fell over the rubbish and was injured. *Goldthrope v. Hardman*, 13 M. & W. 377 (1844). See *Kenny v. Morley*, 2 U. C. C. P. 226 (1852).

²³ *Hildebrand v. Toledo &c. Ry. Co.*, 47 Ind. 399 (1874). The same for causing the death of an engineer. *Evansville &c. R. R. Co. v. Krapf*, 143 Ind. 647 (1895).

²⁴ *Whaite v. Northeastern Ry. Co., El. B. & E.* 719 (1858).

²⁵ *Hollenbeck v. Winnebago County*, 95 Ill. 148 (1880).

²⁶ *King v. Great Western Ry. Co.*, 24 L. T. C. P. (N. S.) 583 (1871).

²⁷ *Fitts v. Waldeck*, 51 Wis. 567 (1881). The same where the injury was caused by the engine

²⁸ *Indianapolis &c. Ry. Co. v. Johnson*, 102 Ind. 352 (1885). A petition for the same. *Kersey v. Kansas City &c. R. R. Co.*, 79 Mo. 362 (1883).

²⁹ *Sullivan v. Toledo &c. Ry. Co.*, 58 Ind. 26 (1877). See also *Jackson v. Indianapolis &c. R. R. Co.*, 47 Ind. 454 (1874); *Luby v. Chicago &c. R. R. Co.*, 52 Iowa, 168 (1879).

³⁰ *Behm v. Armour*, 58 Wis. 1 (1883). Same for injury to servant while at work on the New York and Brooklyn bridge. *Walsh v. Mayor &c. of New York*, 107 N. Y. 220 (1887).

³¹ *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 36 (1879).

³² *Long v. Doxey*, 50 Ind. 885 (1875).

terer;³³ the same against an apothecary for selling a poisonous drug for a harmless medicine, thereby causing injury.³⁴ A declaration against a bridge company, whose bridge was also used as a railway bridge, for frightening horses by cars, causing them to run away, doing injury and damage;³⁵ the same for an injury caused by a vicious horse running at large;³⁶ the same where a customer, in going into a brewery, fell through an open trapdoor and was injured;³⁷ the like for backing one truck against another, injuring a person standing on the latter truck.³⁸ Declaration for killing a horse by a steam engine.³⁹ Declaration for providing an unsafe place for a servant at which to work by negligently piling barrels.⁴⁰ Declaration in suit against a landlord for negligence in not keeping a stairway in a tenement-house in repair.⁴¹

³³ Bishop v. Weber, 139 Mass. 411 (1885).

³⁴ Norton v. Sewall, 106 Mass. 143 (1870). A complaint in an action against a physician for negligently and improperly treating a patient. Hawley v. Williams, 90 Ind. 160 (1883).

³⁵ Peoria Bridge Association v. Loomis, 20 Ill. 235 (1858). Declaration and pleas in full. See Worster v. Canal Bridge, 16 Pick. 541 (1835).

³⁶ Chase v. McDonald, 25 U. C. C. P. 129 (1873). See Duffy v. Howard, 77 Ind. 182 (1881).

³⁷ Chapman v. Rothwell, EL. B. & E. 168 (1858); S. C., 4 Jur. (N. S.) 1180; 27 L. J. Q. B. 315.

³⁸ Bulman v. Furness Ry. Co., 32 L. J. Exch. (N. S.) 430 (1875).

³⁹ Smith v. Eastern R. R. Co., 35 N. H. 356 (1857).

⁴⁰ Libby v. Scherman, 146 Ill. 543 (1893). The same for negligently placing an iron mould so that it fell, injuring a servant. Joliet Steel Co. v. Shields, 146 Ill. 605 (1893).

⁴¹ McKenzie v. Cheetham, 83 Me. 543 (1891).

CHAPTER VII.

EVIDENCE — PROOF.

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221. Miscellaneous points — Rules, reports, time-tables of railroad companies.
222. Allegations and proof.
223. Relevancy of the evidence.
224. Sufficiency of the evidence — New trial.

§ 168. Essentials of proof in accident cases — Burden of proof. — At the trial of an action to recover damages for the death of a human being, or for personal injuries caused by the negligence of the defendant, the burden of proof is on the plaintiff to show: *First*. The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains,¹ and a breach or neglect of that duty by the defendant.² Negligence must be shown; it cannot be presumed.³ The

¹ *Faris v. Hoberg*, 134 Ind. 269, 574 (1873); *Chicago &c. R. R. Co.* 274 (1892); *Angus v. Lee*, 40 Ill. v. *Gregory*, 58 Ill. 272 (1871); *McApp.* 304 (1890); *Cooley on Torts* (2d ed.), 791. *Grell v. Buffalo Office Building Co.*, 153 N. Y. 265, 273 (1897); *Button v. Frink*, 51 Conn. 342 (1883).

² *State v. Baltimore &c. R. R. Co.*, 58 Md. 482 (1882); *Frech v. Philadelphia &c. R. R. Co.*, 39 id. ³ *Mitchell v. Chicago &c. Ry. Co.*, 51 Mich. 236 (1883). Nor can

burden of proof to show it rests upon the plaintiff.⁴ "The principle is quite institutional that, whenever a right of action springs from the conduct of a defendant, the plaintiff must present proof of the facts necessary to the recovery which he seeks. It is, furthermore, the general rule of law that the mere proof of the occurrence of an accident raises no presumption of negligence."⁵ *Second.* That the death complained of, or the injury sustained, by the plaintiff was the natural and proximate result and consequence of such neglect or breach of duty by the defendant.⁶ To establish, by evidence, circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to; and further, that the plaintiff should also show, with reasonable certainty, what particular precautions should have been taken to avoid the accident.⁷ But when it becomes

it be found without evidence. *mingham Union Ry. Co. v. Hale*, 90 Philadelphia &c. R. R. Co. v. Ala. 8 (1890); *Dobbins v. Brown*, Hummell, 44 Pa. St. 375 (1863); 119 N. Y. 188 (1890); *Mitchell v. McGrell v. Buffalo Office Building* Turner, 149 id. 39 (1896); *Omaha Co.*, 153 N. Y. 265, 273 (1897); &c. Ry. Co. v. Talbot, 48 Neb. 627 (1896); *Evansville &c. R. R. Co.* Co., 112 id. 245 (1889). v. Krapf, 143 Ind. 647 (1895). The

⁴ *Allan v. State Steamship Co.*, 132 N. Y. 91 (1892); *Robinson v. Denver &c. R. R. Co.*, 24 Colo. 98 (1897); *Cox v. Norfolk &c. R. R. Co.*, 123 No. Car. 604 (1898). So the burden of sustaining the affirmative of the issue remains on the plaintiff throughout the trial. *Heinemann v. Heard*, 62 N. Y. 448 (1875); *Dowell v. Guthrie*, 99 Mo. 653 (1889); *Button v. Frink*, 51 Conn. 342 (1883).

⁵ *Garrison, J.*, in *Bahr v. Lombard &c. Co.*, 24 Vr. 233, 237 (1890).

⁶ *State v. Baltimore &c. R. R. Co.*, 58 Md. 482 (1882); *Pennsylvania Co. v. Hensel*, 70 Ind. 569, 574 (1880); *Holbrook v. Utica &c. R. R. Co.*, 12 N. Y. 236 (1855); *Philadelphia &c. R. R. Co. v. Boyer*, 97 Pa. St. 91 (1881); *Bir-*

the breach of duty upon which an action is based must not only be the cause, but the proximate cause of the damage to the plaintiff. *Wabash R. R. Co. v. Coker*, 81 Ill. App. 660 (1898).

⁷ *Lovegrove v. London &c. Ry. Co.*, 16 C. B. (N. S.) 669, 692 (1864); *Philadelphia &c. R. R. Co. v. Stebbing*, 62 Md. 504 (1884); *Daniel v. Metropolitan Ry. Co.*, L. R., 3 C. P. 216, 222 (1868). "In every case involving actionable negligence, there are necessarily three elements essential to its existence: 1. The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains. 2. A failure by the defendant to perform that duty; and 3. An injury to the plaintiff from such failure of the

a question whether death resulted from the injury or from some disease with which it had become involved, the one causing the injury cannot escape full liability, without showing that death *must* have resulted if the injury had not been done.⁸ *Third.* The nature and extent of the damages complained of as the natural and proximate result of the defendant's negligent act. *Fourth.* In some of the States, the plaintiff must show that he, or his decedent, was without fault which contributed to the injury.

§ 169. **Contributory negligence — Burden of proof — Conflict-ing decisions.**— In some of the States, as stated in the previous section, though on this point the various courts of the United States are not in harmony, the plaintiff must show, as part of his case and as a condition precedent to his right of recovery, that he, or his decedent, was not negligent, nor did his negligence contribute to produce the injury complained of,⁹ *i. e.*, that

defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient." Hackney, J., in *Faris v. Hoberg*, 134 Ind. 269, 274 (1892).

⁸ *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163 (1883).

⁹ This is so in the following States:

Connecticut: *Park v. O'Brien*, 23 Conn. 339 (1854); *Button v. Frink*, 51 id. 342 (1883). See *Bill v. Smith*, 39 id. 206 (1872); *Ryan v. Town of Bristol*, 63 id. 26 (1893); *Ashborn v. Town of Waterbury*, 70 id. 551 (1898).

Georgia: *Branan v. May*, 17 Ga. 136 (1855); *Campbell v. Atlanta R. R. Co.*, 53 id. 488 (1874); 56 id. 586 (1876); *Central R. R. Co. v. Moore*, 61 id. 151 (1878); *Central R. R. Co. v. Sears*, 59 id. 436 (1877); *Central R. R. Co. v. Kenney*, 58 id. 485 (1877); *Prather v. Richmond &c. R. R. Co.*, 80 id. 427 (1888). See

Code, §§ 3033, 3034, 3036; *Thompson v. Central R. R. Co.*, 54 Ga. 509 (1875).

Illinois: *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585 (1852); *City of Chicago v. Major*, 18 id. 349 (1857); *Galena &c. R. R. Co. v. Jacobs*, 20 id. 478 (1858); *Chicago &c. R. R. Co. v. Gregory*, 58 id. 272 (1871); *Missouri Furnace Co. v. Abend*, 107 id. 44 (1883); *Calumet Iron &c. Co. v. Martin*, 115 id. 368 (1885); *Gerke v. Fancher*, 158 id. 375 (1895).

Indiana: *Mount Vernon v. Dousouhett*, 2 Ind. 586 (1851); *Toledo &c. Ry. Co. v. Brannagan*, 75 id. 490 (1881); *Lyons v. Terre Haute &c. R. R. Co.*, 101 id. 419 (1884); *Cincinnati &c. R. R. Co. v. McMullen*, 117 id. 439 (1888); *Indiana &c. Ry. Co. v. Greene*, 106 id. 279 (1885); *Baltimore &c. Ry. Co. v. Conoyer*, 149 id. 524 (1897). There are other cases in the Indiana reports not cited.

Iowa: *Rusch v. City of Davenport*, 6 Iowa, 443 (1858); *Donald-*

he was himself in the exercise of due care. The plaintiff is not required to prove due care on his part by *direct affirmative*

son v. Mississippi &c. R. R. Co., 18 id. 280 (1865); Greenleaf v. Illinois Central R. R. Co., 29 id. 14 (1870); Benton v. Central R. R. Co., 42 id. 192 (1875); Bonce v. Dubuque Street Ry. Co., 53 id. 278 (1880); Hawes v. Burlington &c. Ry. Co., 64 id. 315 (1884). See Raymond v. Burlington &c. R. R. Co., 65 id. 152 (1884). There are other cases in the Iowa reports not cited.

Louisiana: Moore v. Mayor &c. of Shreveport, 3 La. Ann. 645 (1848).

Maine: Foster v. Inhabitants of Dixfield, 18 Me. 380 (1841); French v. Inhabitants of Brunswick, 21 id. 29 (1842); Benson v. Titcomb, 72 id. 31 (1881); State v. Maine Central R. R. Co., 76 id. 357 (1884); Chase v. Maine &c. R. R. Co., 77 id. 62 (1885); Leasan v. Maine Central R. R. Co., id. 85 (1885); McLane v. Perkins, 92 id. 39 (1898).

Massachusetts: Adams v. Inhabitants of Carlisle, 21 Pick. 146 (1838); Tourtellot v. Rosebrook, 11 Metc. 460 (1846); Robinson v. Fitchburg &c. R. R. Co., 7 Gray, 92 (1856); Gaynor v. Old Colony &c. R. R. Co., 100 Mass. 208 (1868); Chaffee v. Boston &c. R. R. Co., 104 id. 108 (1870); Crafts v. City of Boston, 109 id. 519 (1872); Corcoran v. Boston &c. R. Co., 133 id. 507 (1882); Riley v. Connecticut River R. R. Co., 135 id. 292 (1883); Stock v. Wood, 136 id. 353 (1884); Walsh v. Boston &c. R. R. Co., 171 id. 52 (1898); Taylor v. Carew Mfg. Co., 143 id. 470 (1887); Tumatly v. New York &c. R. R. Co., 170 id. 164 (1898). It is not necessary to show that a passenger was free from negli-

gence. Pub. Stats., chap. 112, § 212; McKimble v. Boston &c. R. Co., 139 Mass. 542 (1885). There are other cases in the Massachusetts reports not cited.

Michigan: Detroit &c. R. R. Co. v. Van Steinburg, 17 Mich. 99 (1868); Lake Shore &c. R. R. Co. v. Miller, 25 id. 274 (1872); Michigan Central R. R. Co. v. Coleman, 28 id. 440 (1874); Teipel v. Hilsendegen, 44 id. 461 (1880); Myun-ning v. Detroit &c. R. R. Co., 67 id. 677 (1888).

Mississippi: Mississippi Central R. R. Co. v. Mason, 51 Miss. 234 (1875); City of Vicksburg v. Hennessy, 54 id. 391 (1877).

New York: Spencer v. Utica &c. R. R. Co., 5 Barb. 337 (1849); Wilds v. Hudson River R. R. Co., 24 N. Y. 430 (1862); Ernst v. Hudson River R. R. Co., 24 How. Pr. 97 (1862); Warner v. New York &c. R. R. Co., 44 N. Y. 465 (1871); Cordell v. New York &c. R. R. Co., 75 id. 330 (1878); Hart v. Hudson River Bridge Co., 80 id. 622 (1880); 84 id. 56 (1881); Lee v. Troy Citizens Gas Light Co., 98 id. 115 (1885); Tolman v. Syracuse &c. R. R. Co., 98 id. 198 (1885); 18 Alb. L. J. 144, 164, 184; Beach on Cont. Neg. (3d ed.), § 433 *et seq.* There are many other cases in the New York reports not cited, from which it would seem that the New York courts have tried to take a middle ground between two rules. Thus Denio, C. J., said: "The rule respecting the *onus* often depends upon the special circumstances of the case, and it not infrequently happens that a party is obliged to establish a

evidence; the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, or the circumstances under which the injury was received.¹⁰ But in some of those courts it has been held that there is no presumption that the plaintiff is free from contributory negligence.¹¹

§ 170. Contributory negligence—Burden of proof—Continued.

—In England and in the Federal courts of the United States, as also in most of the State courts, contributory negligence is a matter of defense, and the burden of proving it rests on the defendant.¹² In some courts the absence of negligence on the

negative proposition." *Sheldon v. Walker v. Town of Westfield*, 39 *Hudson River R. R. Co.*, 14 N. Y. id. 246 (1867); *Bovee v. Town of* 218, 221 (1856); *Johnson v. Hudson Danville*, 53 id. 183 (1880); *Lazelle River R. R. Co.*, 20 id. 65 (1859). *v. Town of Newfane*, 69 id. 306 (1897). *Contra*, *Lester v. Town of* In 1885, Mr. Justice Finch, of the *Pittsford*, 7 Vt. 158 (1835).

stated the rule to be "The burden was upon the plaintiff of showing *affirmatively*, either by direct evidence or the drift of surrounding circumstances, that the deceased was himself without fault." *Tolman v. Syracuse &c. R. R. Co.*, 98 N. Y. 198, 202 (1885).

North Carolina: *Manly v. Wilmington &c. R. R. Co.*, 74 No. Car. 655 (1876); *Doggett v. Richmond &c. R. R. Co.*, 78 id. 305 (1878); *Owens v. Richmond &c. R. R. Co.*, 88 id. 503 (1883). Changed by Stats. 1887, chap. 33. *Wallace v. Western R. R. Co.*, 104 No. Car. 442 (1889); *Jordan v. City of Asheville*, 112 id. 743 (1893).

Oregon: *Kahn v. Love*, 3 Or. 206 (1869); *Walsh v. Oregon &c. Ry. Co.*, 10 id. 250 (1882). See *Grant v. Baker*, 12 Or. 329 (1885); *Conroy v. Oregon Construction Co.*, 23 Fed. Rep. 71 (1885).

Vermont: *Hill v. Town of New Haven*, 37 Vt. 501 (1865); *Barber v. Town of Essex*, 27 id. 62 (1854);

¹⁰ *Mayo v. Boston &c. R. R. Co.*, 104 Mass. 137 (1870). This principle is stated in many cases. *Commonwealth v. Metropolitan R. R. Co.*, 107 Mass. 236 (1871); *Mendota v. Fay*, 1 Ill. App. 418 (1877); *St. Louis &c. R. R. Co. v. Andres*, 16 id. 292 (1885); *Missouri Furnace Co. v. Abend*, 107 Ill. 44 (1883); *Button v. Hudson River R. R. Co.*, 18 N. Y. 248 (1858); *Hart v. Hudson River Bridge Co.*, 80 id. 622 (1880); *Tolman v. Syracuse &c. R. R. Co.*, 98 id. 198, 202 (1885); *Rusch v. City of Davenport*, 6 Iowa, 443 (1858); *Lazelle v. Town of Newfane*, 69 Vt. 306 (1897); *Ryan v. Town of Bristol*, 63 Conn. 26 (1893).

¹¹ *Warner v. New York &c. R. R. Co.*, 44 N. Y. 465 (1871); *Wiwirowski v. Lake Shore &c. R. R. Co.*, 124 id. 420 (1891); *Bonce v. Dubuque Street Ry. Co.*, 53 Iowa, 278 (1880).

¹² This is so in

England: *Byrne v. Boadle*, 2

part of the plaintiff may be inferred or presumed from the love

- Hurlst. & C. 722 (1863); Holden v. Liverpool New Gas &c. Co., 3 C. B. 1 (1846); 3 Man., Gr. & S. 1.
- Canada: Cornish v. Toronto St. Ry. Co., 23 U. C. C. P. 355 (1873).
- United States courts: Washington &c. R. R. Co. v. Gladmon, 15 Wall. 401 (1872); Indianapolis &c. R. R. Co. v. Horst, 93 U. S. 291 (1876); Hough v. Texas &c. Ry. Co., 100 id. 213 (1879); Washington &c. R. R. Co. v. Harmon, 147 id. 571 (1892); Crew v. St. Louis &c. Ry. Co., 20 Fed. Rep. 87 (1884); Conroy v. Oregon Construction Co., 23 id. 71 (1885); Wabash &c. R. R. Co. v. Central Trust Co., id. 738 (1885); Tolson v. Inland &c. Coasting Co., 6 Mackey, 39 (1887); Second v. St. Paul &c. Ry. Co., 5 McCreary, 515 (1883); Morgan v. Illinois Bridge Co., 5 Dill. 96 (1878). Overruled, Hull v. Town of Richmond, 2 Woodb. & M. 337 (1846); Beardsley v. Swann, 4 McLean, 333 (1847).
- Alabama: Smoot v. Mayor &c. of Wetumpka, 24 Ala. 112 (1854); Holt v. Whately, 51 id. 569 (1874); Mobile &c. Ry. Co. v. Crenshaw, 65 id. 566 (1880); East Tennessee &c. R. R. Co. v. Clark, 74 id. 443 (1883); Montgomery &c. Ry. Co. v. Chambers, 79 id. 338 (1885).
- Arizona: Lopez v. Central Arizona Mining Co., 1 Ariz. 464 (1883). See Hobson v. New Mexico &c. R. R. Co., 11 Pac. Rep. 545 (1886).
- Arkansas: Texas &c. Ry. Co. v. Orr, 46 Ark. 182 (1885); Little Rock &c. Ry. Co. v. Atkins, 46 id. 423 (1885); Little Rock &c. Ry. Co. v. Cavenesse, 48 id. 106 (1886); Little Rock &c. Ry. v. Leverett, 48 id. 333 (1886); Little Rock &c. Ry. Co. v. Eubanks, 48 id. 460 (1886).
- California: May v. Hanson, 5 Cal. 360 (1855); Finn v. Vallejo St. Wharf Co., 7 id. 253, 255 (1857); Gay v. Winter, 34 id. 153 (1867); Robinson v. Western Pacific R. R. Co., 48 id. 409 (1874); McQuilkin v. Central Pacific R. R. Co., 50 id. 7 (1875); MacDougal v. Central R. Co., 63 id. 431 (1883).
- Colorado: City of Denver v. Dunsmore, 7 Colo. 328 (1884); White v. City of Trinidad, 10 Colo. App. 327 (1897).
- Dakota: Sanders v. Reister, 1 Dak. 151 (1875).
- Delaware: Wilkins v. Mayor of Wilmington, 2 Marvel, 132 (1895).
- Florida: Louisville &c. R. R. Co. v. Yniestra, 21 Fla. 700 (1886).
- Idaho: Hopkins v. Utah Northern Ry. Co., 2 Idaho, 277 (1887); 13 Pac. Rep. 343.
- Kansas: Kansas &c. R. R. Co. v. Phillibert, 25 Kans. 583 (1881); St. Louis &c. Ry. Co. v. Weaver, 35 id. 412 (1886); Missouri Pac. Ry. Co. v. McCally, 41 id. 639 (1889).
- Kentucky: Louisville &c. Canal Co. v. Murphy, 9 Bush, 522, 529 (1872); Paducah &c. R. R. Co. v. Hoehl, 12 id. 41 (1876); Kentucky Central R. R. Co. v. Thomas, 79 Ky. 160 (1880).
- Maryland: Northern Central Ry. Co. v. State, 31 Md. 357 (1869); Frech v. Philadelphia &c. R. R. Co., 39 id. 574 (1873); State v. Baltimore &c. R. R. Co., 58 id. 482 (1882); County Commissioners of Prince George County v. Burgess, 61 id. 29 (1883); Baltimore &c. R. Co. v. State, 60 id. 449 (1883).
- Minnesota: Hocum v. Weitherrick, 22 Minn. 152 (1875).
- Missouri: Thompson v. North Mo. R. R. Co., 51 Mo. 190 (1873);

of life or the instinct of self-preservation and the known dis-

Buesching v. St. Louis Gas Light Co., 73 id. 219 (1880); Mitchell v. City of Clinton, 99 id. 153 (1889); Hudson v. Wabash &c. Ry. Co., 32 Mo. App. 667 (1888).

Montana: Nelson v. City of Helena, 16 Mont. 21 (1895); Prosser v. Montana Cent. R. R. Co., 17 id. 372 (1895).

Nebraska: City of Lincoln v. Walker, 18 Neb. 224 (1885).

New Hampshire: White v. Concord R. R. Co., 30 N. H. 188, 207 (1855); Smith v. Eastern R. R. Co., 35 id. 356, 366 (1857).

New Jersey: Durant v. Palmer, 5 Dutch. 544 (1862); Central R. R. Co. v. Moore, 4 Zab. 824 (1854); New Jersey Express Co. v. Nichols, 3 Vr. 166; 4 id. 434 (1867); Drake v. Morent, 4 id. 441 (1867).

North Carolina: So by statute 1887, chap. 33; Wallace v. Western R. R. Co., 104 No. Car. 442 (1889); Jordan v. City of Asheville, 112 id. 743 (1893); Cox v. Norfolk &c. R. R. Co., 123 id. 604 (1898).

North Dakota: Ouverson v. City of Grafton, 5 No. Dak. 281 (1895).

Ohio: Cleveland &c. R. R. Co. v. Crawford, 24 Ohio St. 631 (1874); Robinson v. Gary, 28 id. 241, 250 (1876); Baltimore &c. R. R. Co. v. Whitacre, 35 id. 627 (1880).

Oregon: Grant v. Baker, 12 Or. 329 (1885).

Pennsylvania: Beatty v. Gilmor, 16 Pa. St. 463 (1851); Pennsylvania Canal Co. v. Bentley, 66 id. 30 (1870); Cleveland &c. R. R. Co. v. Rowan, id. 393 (1870); Pennsylvania R. R. Co. v. Weber, 76 id. 157 (1874); Mallory v. Griffey, 85 id. 275 (1877); Bradwell v. Pittsburgh &c. Ry. Co., 139 id. 404 (1890); Ba-

ker v. Westmoreland &c. Gas Co., 157 id. 593 (1893). Some of the cases seem to be *contra* and hold that the *onus* is on the plaintiff. Federal Street &c. Ry. Co. v. Gibson, 96 Pa. St. 83 (1880); Baker v. Fehr, 97 id. 70 (1881); Philadelphia &c. R. R. Co. v. Boyer, id. 91 (1881); Farley v. Philadelphia Trac-tion Co., 132 id. 58 (1890).

Rhode Island: Cassidy v. Angell, 12 R. I. 447 (1879).

South Carolina: Danner v. South Carolina R. R. Co., 4 Rich. 329 (1851); Carter v. Columbia &c. R. R. Co., 19 So. Car. 20 (1882).

South Dakota: Smith v. Chicago &c. Ry. Co., 4 So. Dak. 71 (1893).

Tennessee: See East Tennessee &c. R. R. Co. v. Stewart, 13 Lea, 432 (1884); Stewart v. City of Nashville, 96 Tenn. 50 (1896); Bam-berger v. Citizens Street Ry. Co., 95 id. 18 (1895).

Texas: Texas &c. R. R. Co. v. Murphy 46 Tex. 356 (1876); Hous-ton &c. Ry. Co. v. Cowser, 57 id. 293 (1882); Dallas &c. Ry. Co. v. Spicker, 61 id. 427 (1884); San An-tonio &c. Ry. Co. v. Bennett, 76 id. 151 (1890). *Contra*, Texas &c. Ry. Co. v. Crowder, 63 id. 502 (1885); Walker v. Herron, 22 id. 55 (1858).

Utah: Anderson v. Ogden &c. Co., 8 Utah, 128 (1892).

Virginia: Baltimore &c. R. R. Co. v. Whittington, 30 Gratt. 805 (1878); Moon v. Richmond &c. R. R. Co., 78 Va. 745 (1884); Norfolk &c. R. R. Co. v. Ferguson, 79 id. 241 (1884); Gordon v. City of Rich-mond, 83 id. 436 (1887); Southern Ry. Co. v. Bryant, 95 id. 212 (1897); id. 125 (1897).

Washington: Northern Pac. R. R.

position of men to avoid injury.¹³ But it is only when there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumptions can be invoked.¹⁴ When there is nothing in plaintiff's evidence tending to show contributory negligence the presumption is against it.¹⁵ If the proof of the cause of the injury, with its attendant circumstances, raises a presumption that the plaintiff was not in the exercise of due care, he must show affirmatively that he was not guilty of contributory negligence,¹⁶ because if contributory negligence be shown on the part of the plaintiff, he must fail.¹⁷ But if the plaintiff

Co. v. O'Brien, 1 Wash. St. 599 (1889); *Spurrier v. Front Street Ry. Co.*, 3 id. 659 (1892).

West Virginia: *Snyder v. Pittsburgh &c. Ry. Co.*, 11 W. Va. 14 (1887); *Sheff v. City of Huntington*, 16 id. 307 (1880).

Wisconsin: *Achtenhagen v. City of Watertown*, 18 Wis. 347 (1864); *Hoyt v. City of Hudson*, 41 id. 105 (1876); *Prideaux v. City of Mineral Point*, 43 id. 513 (1878); *Randall v. Northwestern Tel. Co.*, 54 id. 140, 147 (1882); *Kelly v. Chicago &c. Ry. Co.*, 60 id. 480 (1884); *McNamara v. Village of Clintonville*, 62 id. 207 (1885); *Dugan v. Chicago &c. Ry. Co.*, 85 id. 609 (1893), *overruling* *Dressler v. Davis*, 7 id. 527 (1858); *Chamberlain v. Milwaukee &c. R. R. Co.*, id. 425 (1858); *Milwaukee &c. R. R. Co. v. Hunter*, 11 id. 167 (1860).

¹³ *Allen v. Willard*, 57 Pa. St. 347 (1868); *Cleveland &c. R. R. Co. v. Rowan*, 66 id. 393 (1870); *Thomas v. Delaware &c. R. R. Co.*, 8 Fed. Rep. 731 (1882); *Northwestern Central Ry. Co. v. State*, 31 Md. 357 (1869); *Atchison &c. R. R. Co. v. Aderhold*, 58 Kan. 293, 298 (1897). See *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65 (1881); *Whart. on Neg.*, § 42; 2 *Thomp. on*

Neg. 1179, § 27. *Contra*, when the burden is on the plaintiff to establish freedom from negligence, it may give character or force to facts already proven, but it does not, of itself, add or create proof. *Chase v. Maine Central R. R. Co.*, 77 Me. 62 (1885).

¹⁴ *Philadelphia &c. R. R. Co. v. Stebbing*, 62 Md. 504, 518 (1884); *Maryland Central R. R. Co. v. Neubeur*, id. 391 (1884).

¹⁵ *Hoyt v. City of Hudson*, 41 Wis. 105 (1876); *Little Rock &c. Ry. Co. v. Eubanks*, 48 Ark. 460 (1886).

¹⁶ *Baltimore &c. R. R. Co. v. Whitacre*, 35 Ohio St. 627 (1880); *Dallas &c. Ry. Co. v. Spicker*, 61 Tex. 427 (1884).

¹⁷ *Davey v. London &c. Ry. Co.*, L. R., 11 Q. B. D. 213 (1883); *Baltimore &c. R. R. Co. v. Whitacre*, 35 Ohio St. 627 (1880); *Cleveland &c. R. R. Co. v. Rowan*, 66 Pa. St. 393 (1870); *Prideaux v. City of Mineral Point*, 43 Wis. 513 (1878); *Milwaukee &c. R. R. Co. v. Hunter*, 11 id. 167 (1860); *Overby v. Chesapeake &c. Ry. Co.*, 37 W. Va. 524 (1893); *Cassidy v. Angell*, 12 R. I. 447 (1879); *Gahagan v. Boston &c. R. R. Co.*, 1 Allen, 187 (1861); *New Jersey Express Co. v.*

makes out a *prima facie* case in those courts, without disclosing contributory negligence, the defendant must assume the burden of making out that defense,¹⁸ and make proof thereof by a preponderance of proof.¹⁹

§ 171. **Contributory negligence — Presumptions.**—Contributory negligence is proven by the same character of evidence as any other fact. The evidence may be either direct and positive or by circumstances and inferences. The rule of evidence which places the burden of proof either upon the plaintiff or defendant to show, in the first instance, that the plaintiff was free from fault, is of vital importance in that class of cases where death results and there was no eye-witness to the occurrence, because it is apparent if, under these circumstances, the burden of proof is on the plaintiff to show, as part of his case, that the deceased was free from fault and no presumption is allowed by the court, either of care or fault, the plaintiff must fail; so if the presumption is that the deceased was at fault. On the other hand, if the presumption is that the deceased was free from fault, or the burden of proof rests on the defendant to show the plaintiff's contributory negligence, the plaintiff can succeed. On this point the courts are not in harmony, nor is the line which divides the courts on this point drawn by the rule which throws, in some courts, the burden of proof upon the plaintiff to show, in the first instance, that he is free from fault. Judge Ray, in his book on Negligence of Imposed Duties,²⁰ says: There are three well-marked divisions into which

Nichols, 4 Vr. 434 (1867); Piper v. 109, Laws of 1897 of North Carolina, on motion to nonsuit on ground of contributory negligence, see Cox v. Norfolk &c. R. R. Co., 123 No. Car. 604 (1898). For practice in South Carolina, see Petrie v. Columbia &c. R. R. Co., 29 So. Car. 303 (1888).
¹⁸ Baker v. Westmoreland &c. Gas Co., 157 Pa. St. 593 (1893).
¹⁹ Wilkins v. Mayor &c. of Wilmington, 2 Marvel, 132 (1895, Del.).
²⁰ Chap. 33, § 186. See Lawson on Law of Presumptive Evidence, pp. 121-134.

109, Laws of 1897 of North Carolina, on motion to nonsuit on ground of contributory negligence, see Cox v. Norfolk &c. R. R. Co., 123 No. Car. 604 (1898). For practice in South Carolina, see Petrie v. Columbia &c. R. R. Co., 29 So. Car. 303 (1888).
¹⁸ Baker v. Westmoreland &c. Gas Co., 157 Pa. St. 593 (1893).
¹⁹ Wilkins v. Mayor &c. of Wilmington, 2 Marvel, 132 (1895, Del.).
²⁰ Chap. 33, § 186. See Lawson on Law of Presumptive Evidence, pp. 121-134.

such cases fall: (1) Those courts in which it is held that the law raises a presumption of due care.²¹ (2) Those courts which hold that the law raises a presumption of contributory negli-

²¹ Delaware: *Martin v. Baltimore &c. R. R. Co.*, 2 Marvel, 123 (1895).

Illinois: Evidence that deceased was intelligent, sober and careful will authorize the jury to presume that he was using ordinary care for his safety when there is no evidence to the contrary, and when there were no eye-witnesses to the accident. *Dallinard v. Saalfeldt*, 175 Ill. 310 (1898); *Chicago &c. R. R. Co. v. Sanderson*, 174 id. 495 (1898); *Illinois Central R. R. Co. v. Ashline*, 171 id. 313 (1898); *McNulta v. Lockeridge*, 137 id. 270 (1891).

Iowa: See *Salysers v. Monroe*, 104 Iowa, 74 (1897).

Kansas: *St. Louis &c. Ry. Co. v. Weaver*, 35 Kan. 412, 424 (1886); *Atchison &c. R. R. Co. v. Aderhold*, 58 id. 293, 298 (1897); *City of Fort Scott v. Peck*, 5 Kan. App. 593, 609 (1897).

Maryland: *Northern Cent. Ry. Co. v. State*, 29 Md. 420 (1868); 31 id. 357 (1869). The jury may infer absence of fault on the part of deceased, from the general and known disposition of men to take care of themselves and keep out of the way of difficulty and danger.

Michigan: One killed at a crossing, the presumption is that deceased did stop, look and listen. *Myunning v. Detroit &c. R. R. Co.*, 64 Mich. 93 (1887). Same in Oregon. *McBride v. Northern Pac. R. R. Co.*, 19 Or. 64 (1890). And this on the ground that it can never be presumed, in the absence of evidence, that a person

fails to do that which people ordinarily do to avoid injury. *Chicago &c. Ry. Co. v. Hinds*, 56 Kan. 758, 764 (1896); *Texas &c. Ry. Co. v. Gentry*, 163 U. S. 353 (1895).

Missouri: *Fulger v. Bothe*, 43 Mo. App. 44, 55 (1890); *Flynn v. Kansas City &c. R. R. Co.*, 73 Mo. 195 (1883); *Buesching v. St. Louis Gas Light Co.*, 73 id. 219, 233 (1880).

New Hampshire: *Lyman v. Boston &c. R. R. Co.*, 66 N. H. 200 (1890).

Pennsylvania: Presumption that men in their sober senses will avoid injury and preserve life. *Allen v. Willard*, 57 Pa. St. 347 (1868). Love of life and instinct of self-preservation will stand for proof of care. *Cleveland &c. R. R. Co. v. Rowan*, 66 Pa. St. 393 (1870). Presumption that plaintiff at railroad crossing had "stopped, looked and listened." *Weiss v. Pennsylvania R. R. Co.*, 79 Pa. St. 387 (1875). This is a presumption of fact and may be rebutted. *Schum v. Pennsylvania R. R. Co.*, 107 Pa. St. 8 (1884).

Rhode Island: A person of ordinary intelligence will not purposely expose himself to danger. *Cassidy v. Angell*, 12 R. I. 447 (1879).

Wisconsin: One killed upon a public sidewalk, presumption that she placed herself upon the walk without want of ordinary care. *Phillips v. Milwaukee &c. R. R. Co.*, 77 Wis. 349 (1890). See *Barstow v. City of Berlin*, 34 Wis. 362 (1874); *Achtenhagen v. City of Watertown*, 18 Wis. 331 (1864).

gence.²² (3) Those courts which admit no presumption whatever.²³ Where there are witnesses to the accident, there is no room for presumption either way. The presumption is overthrown when there is direct proof to the contrary.²⁴

§ 172. **Action based on foreign statute — Such statute must be proved.**— In those States in which an action can be maintained for causing the death of a human being, when such death was caused in another State, proof must be made of the statute of such other State which gives a right of action for causing the death of a human being.²⁵ This is so in all cases where the right of action springs from the foreign statute.

²² Indiana: It cannot be presumed that the plaintiff is free from fault. *Toledo &c. R. R. Co. v. Brannagan*, 75 Ind. 490, 495 (1881); *Indiana &c. R. R. Co. v. Greene*, 106 id. 279 (1885).

²³ Maine: *McLane v. Perkins*, 92 Me. 39 (1898).

Massachusetts: *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 262 (1876). The inference of care is only warranted when circumstances are shown which fairly indicate care or exclude the idea of negligence. *Ib.*; *Gaynor v. Old Colony &c. R. R. Co.*, 100 Mass. 208 (1868).

New York: "The presumption that every person will take care of himself from regard to his own life and safety cannot take the place of proof, because experience shows that persons exposed to danger will frequently forego the ordinary precautions of safety." *Cordell v. New York &c. R. R. Co.*, 75 N. Y. 332 (1878); *Palmer v. New York &c. R. R. Co.*, 112 id. 245; *Galvin v. Mayor &c. of New York*, 112 id. 223, 228 (1889). Must be shown by a preponderance of evidence. *Bond v. Smith*, 113 id. 378, 385 (1889); *Riordan v. Ocean SS.*

Co., 124 id. 655 (1891); *Wiwirowski v. Lake Shore &c. Ry. Co.*, 124 id. 420 (1891).

Vermont: The plaintiff, to establish that he was in the exercise of due care, need not produce an eye-witness to the accident. It is sufficient that the circumstances justify the inference. *Lazelle v. Town of Newfane*, 69 Vt. 306 (1897). Ordinary care may be established by circumstantial evidence. *Illinois Central R. R. Co. v. Cozby*, 174 Ill. 109 (1898).

²⁴ *Atchison &c. R. R. Co. v. Aderhold*, 58 Kan. 293, 298 (1897). When there is direct evidence as to care it is error to charge the jury that "the natural instincts of man are to guard himself against danger, and preserve himself from injury." *Salyers v. Monroe*, 104 Iowa, 74 (1897).

²⁵ See § 107. Judicial notice thereof will not be taken. *Cincinnati &c. R. R. Co. v. McMullen*, 117 Ind. 439 (1888); *Debevoise v. New York &c. R. R. Co.*, 98 N. Y. 377 (1885). So the law of another State, whether declared by judicial decisions or otherwise, if relied on to defeat an action alleged to have accrued in that

§ 173. **What facts are essential to prove negligence.**— It is not enough for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion or even a fair inference that there may have been negligence on the part of the defendant. He must go on and give evidence of some specific act of negligence on the part of the one against whom he seeks compensation.²⁶ To establish a case of negligence and fix the liability of the defendant, it is incumbent upon the plaintiff to prove some fact which is more consistent with negligence of the defendant than with the absence of it.²⁷ When the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail,²⁸ because there is always a presumption against negligence and in favor of innocence.²⁹ A *probability* is not sufficient;³⁰ nor is a mere surmise or con-

State and sought to be enforced in another State, must be pleaded and proved, as judicial notice thereof will not be taken for such purpose. Cincinnati &c. R. R. Co. v. McMullen, 117 Ind. 439 (1888).

²⁶ Lovegrove v. London &c. Ry. Co., 16 C. B. (N. S.) 669, 692 (1864); Daniel v. Metropolitan Ry. Co., L. R., 3 C. P. 216, 222 (1868); Philadelphia &c. R. R. Co. v. Stebbing, 62 Md. 504 (1884); Philadelphia &c. R. R. Co. v. Hummell, 44 Pa. St. 375 (1863); Laidlaw v. Sage, 158 N. Y. 73 (1899). In the absence of direct evidence he must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and exclude the idea that it was due to a cause with which the defendant was unconnected. Suburban Electric Co. v. Nugent, 29 Vr. 658 (1896); Rupert v. Brooklyn Heights R. R. Co., 154 N. Y. 90 (1897).

²⁷ Toomey v. London &c. Ry. Co., 3 C. B. (N. S.) 146, 150 (1857).

²⁸ Cotton v. Wood, 8 C. B. (N. S.)

568 (1860); Jackson v. Hyde, 28 U. C. Q. B. 294 (1869); Deverill v. Grand Trunk Ry. Co., 25 id. 517 (1866); Blackmore v. Toronto Street Ry. Co., 38 id. 172 (1876); Story v. Veach, 22 U. C. C. P. 164 (1872); Baulec v. New York &c. R. R. Co., 59 N. Y. 356 (1874); Hayes v. Forty-second Street &c. R. R. Co., 97 id. 259 (1884). If the evidence is in equipoise the verdict of the jury must be against the party on whom the burden of proof previously rested. Birmingham Union Ry. Co. v. Hale, 90 Ala. 8 (1890).

²⁹ Philadelphia &c. R. R. Co. v. Hummell, 44 Pa. St. 375 (1863).

³⁰ Searles v. Manhattan Ry. Co., 101 N. Y. 661 (1886); Sheldon v. Hudson River R. R. Co., 29 Barb. 226, 228 (1859). Circumstantial proof discussed by O'Brien, J., in Ruppert v. Brooklyn Heights R. R. Co., 154 N. Y. 90 (1897). Explosion from an unknown cause balancing of probabilities. See Schoepper v. Hancock Chemical Co., 113 Mich. 582 (1897). In Shearm. & Redf. on Neg. (5th ed.), § 58, it is said "this is going too far."

jecture.³¹ The plaintiff must do more than show the *possible* responsibility of the defendant for the injury.³² The mere fact of a defect in premises and a resulting injury therefrom is not proof of the owner's negligence.³³

§ 174. **The evidence need not be direct and positive — Preponderance of evidence.**— It is settled by many cases that it is not necessary that the evidence be direct and positive. Negligence may be proved as well by circumstances and presumptions,³⁴ from which the inference or conclusion of negligence

³¹ *Dobbins v. Brown*, 119 N. Y. 188 (1890); *Morris v. Lake Shore &c. Ry. Co.*, 148 id. 182, 185 (1896); *Bond v. Smith*, 113 id. 378, 385 (1889).

³² *Suburban Electric Co. v. Nugent*, 29 Vr. 658 (1896); *Bond v. Smith*, 113 N. Y. 378 (1889); *Searles v. Manhattan Ry. Co.*, 101 id. 661 (1886); *Baltimore &c. R. R. Co. v. State*, 71 Md. 591 (1889). Action for killing the husband of the plaintiff who was walking on a footpath on the right of way of the defendant, running by the side of the track of the railway. A train moving east upon the railway track, which was operated by the employes of the defendant, was wrecked, and the next morning from under the wreck, and lying within two or three feet of the track, the dead body of the intestate was found, his head having been severed from his body. Chief Justice Gaines, speaking for the Supreme Court of Texas, said: "In order for the plaintiff to recover, it was necessary that she should prove these propositions: (1) That the death of her husband was caused by the derailment of the train; (2) that the derailment was the result of a want of due care, either in the equipment or operation of the train, on the part

of the agents or servants of the company; (3) that the injury to the deceased, or some injury of a like character to some other person similarly situated, ought to have been foreseen by such agents or servants as a probable sequence of such negligence; and (4) that he was not a trespasser upon the defendant's track or cars." *Washington v. Missouri &c. Ry. Co.*, 90 Tex. 314, 319 (1897).

³³ In a suit by lessee against lessor. *Schanda v. Sulsberger*, 7 App. Div. 221 (1896); 40 N. Y. Supp. 116.

³⁴ *Illinois Central R. R. Co. v. Cragin*, 71 Ill. 177 (1873); *McKissock v. St. Louis &c. Ry. Co.*, 73 Mo. 456 (1881); *Buesching v. St. Louis Gas Light Co.*, id. 219 (1880); *Blewett v. Wyandotte &c. Ry. Co.*, 72 id. 583 (1880); *Kelly v. Hannibal &c. R. R. Co.*, 70 id. 604 (1879); *Greenleaf v. Illinois Central R. R. Co.*, 29 Iowa, 14 (1870); *Castello v. Landwehr*, 28 Wis. 522 (1871); *Quaife v. Chicago &c. Ry. Co.*, 48 id. 513 (1880); *Wood v. Chicago &c. Ry. Co.*, 51 id. 196 (1881); *Terre Haute &c. R. R. Co. v. Buck*, 96 Ind. 346, 363 (1881); *Lackawanna &c. R. R. Co. v. Doak*, 52 Pa. St. 379 (1866); *Hays v. Gallagher*, 72 id. 136 (1872); *Daniel v. Metropolitan Ry. Co.*, L.

may be fairly drawn; but such presumptions and circumstances, to be legally sufficient to rest verdicts upon, must be the conclusion from facts proven or admitted in the case — not presumptions drawn from presumptions which, in all cases of legal evidence, are too weak and uncertain to support judgments and verdicts.³⁵ The plaintiff is not bound to prove his case so clearly as to exclude the possibility of any other theory.³⁶ In civil actions the evidence is not required to be such as to establish, beyond a reasonable doubt, the facts relied upon for a recovery.³⁷ A verdict may be based on a preponderance of the evidence, if sufficient to satisfy the minds of the jury.³⁸ But a mere preponderance of evidence upon the one side or the other does not necessarily afford a basis for a verdict.³⁹ A preponder-

R., 3 C. P. 216, 222 (1868); *Czech v. General Steam Nav. Co.*, id. 14 (1867); *Jones v. New York Central &c. R. R. Co.*, 28 Hun, 364 (1882); *Kansas Pacific Ry. Co. v. Miller*, 2 Colo. 442 (1874); *Cassidy v. Angell*, 12 R. I. 447 (1879); *Cincinnati &c. R. R. Co. v. McMullen*, 117 Ind. 439 (1889); *Illinois Central R. R. Co. v. Slater*, 129 Ill. 91 (1889).

³⁵ *Philadelphia City Passenger Ry. Co. v. Henrice*, 92 Pa. St. 434 (1880); *Gillespie v. McGowan*, 100 id. 144 (1882); *Lehman v. City of Brooklyn*, 29 Barb. 234 (1859); *State v. Baltimore &c. R. R. Co.*, 58 Md. 221 (1881); *Northern Central Ry. Co. v. State*, 54 id. 113 (1880); *Sorenson v. Menasha Paper &c. Co.*, 56 Wis. 338 (1882); *Washington v. Missouri &c. Ry. Co.*, 90 Tex. 314 (1897).

³⁶ *Whitney v. Clifford*, 57 Wis. 156, 158 (1883). Or that it was impossible that there should be any other cause; it was sufficient if it satisfied the jury that there was none. *White v. Boston &c. R. R. Co.*, 144 Mass. 404 (1887).

³⁷ *Hartwig v. Chicago &c. Ry. Co.*, 49 Wis. 358 (1880); *Quaife v.*

Chicago &c. Ry. Co., 48 id. 513 (1880); *Seybolt v. New York &c. R. R. Co.*, 95 N. Y. 562 (1884); *Alpern v. Churchill*, 53 Mich. 607 (1884); *Bradwell v. Pittsburgh &c. R. R. Co.*, 139 Pa. St. 404 (1890); *Louisville &c. R. R. Co. v. Jones*, 83 Ala. 376 (1887).

³⁸ *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8 (1890); *Alabama Mineral R. R. Co. v. Marcus*, 115 id. 389, 395 (1896); *Bradwell v. Pittsburgh &c. Ry. Co.*, 139 Pa. St. 404 (1890). To charge a jury that they must be "thoroughly satisfied" is error. *Ib.*; *Seybolt v. New York &c. R. R. Co.*, 95 N. Y. 562 (1884).

³⁹ *Alabama: Mineral R. R. Co. v. Marcus*, 115 Ala. 389, 395 (1896). The plaintiff is not required to prove his case by a clear preponderance of evidence. *Taylor v. Felsing*, 164 Ill. 331 (1896). A mere preponderance of evidence is sufficient. *Hodges v. Southern Ry. Co.*, 122 No. Car. 992 (1898); *Wilkins v. Mayor &c. Wilmington*, 2 Marvel, 132 (1895, Del.). Or if the evidence *slightly* preponderates. *Donley v. Dougherty*, 174 Ill. 582 (1898).

ance of the evidence may or may not be given by the greater number of witnesses.⁴⁰

§ 175. **Illustrative cases — Applications of the rule.**— In a case in the Court of Appeals of New York, the court said: "It was incumbent upon the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the death of the deceased. But it needs not that this be done by the positive and direct evidence of the negligence of the defendant. The proofs may be indirect and the evidence had by showing circumstances from which the inference is fairly drawn that these principal and essential facts existed. When, from the circumstances shown, inferences are to be drawn which are not certain and uncontrovertible, and may be differently made by different minds, it is for the jury to make them; that is to say, when the process is to be had at a trial of ascertaining whether one fact had being from the existence of another fact, it is for the jury to go through with that process. * * * It is not necessary to warrant us in adjudging that there was error in granting a nonsuit for us to be convinced that the legal probabilities are so strong as that the plaintiff is entitled to a verdict. What we have to arrive at is this, that there were facts in the case which were so weak as to give no support in such fair and sound minds to such legal probabilities — so weak as that the law will not tolerate that a verdict should be founded upon them. We are not to be able to say that the facts and the inferences to be had from them are enough to convince our own minds that the intestate died there without negligence on her part and by the negligence of the defendant. What we are to be able to say is this, that the case is not so clear against plaintiff as that there is no room for doubt that there are facts and circumstances which are proper to be submitted to the consideration of the triers of fact."⁴¹ Where plaintiff's intestate

⁴⁰ *Lamb v. City of Cedar Rapids*, his side, except that which operates merely to answer, avoid, or (1899): *Chicago &c. R. R. Co. v. McGowan*, 40 Ill. 218 (1866). The plaintiff or party holding the affirmative must try his case out when he commences, and is bound to introduce all the evidence on

⁴¹ *Hart v. Hudson River Bridge Co.*, 80 N. Y. 632 (1880). See *Ward*

was found dead in the morning, in an excavation made by the defendants, along the sidewalk of a street, and there was no direct evidence in the case as to how he came there, Mr. Justice Agnew, speaking for the Supreme Court of Pennsylvania, said: "The natural instincts which lead men in their sober senses to avoid injury and preserve life is an element of evidence. In all questions touching the conduct of men, motives, feeling and natural instincts are allowed to have their weight and to constitute evidence for the consideration of courts and juries."⁴² So, in a case in the Supreme Court of Kansas, it was said: "In addition to the facts proved, the jury had a right to use the knowledge and experience they are supposed to possess, in common with the generality of mankind, in making up a verdict."⁴³ As in the nature of the case the plaintiff must labor under difficulties in making proof of the fact of negligence, and as that fact itself is always a relative one, it may be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, which might not be satisfactory in other cases — free from difficulty and open to clearer proofs — and this upon the general principles of evidence which

v. Southern Pac. Co., 25 Or. 433 (1894). Proof that similar accidents do not happen from similar things, when properly managed, is competent to raise a presumption of negligence where an accident has happened.

⁴² Allen v. Willard, 57 Pa. St. 347, 380 (1868). For cases where the facts are similar, see Hays v. Gallagher, 72 Pa. St. 136 (1872); Gillespie v. McGowan, 100 id. 144 (1882); Buesching v. St. Louis Gas Light Co., 73 Mo. 219 (1880); reversing 6 Mo. App. 85 (1878); Cassidy v. Angell, 12 R. I. 447 (1879). The mere fact that a man is found dead under a railroad car does not raise a presumption that he came to his death through the negligence of the railroad company. Spears v. Chicago &c. R. R. Co., 43 Neb. 720 (1895); Ward v.

Southern Pac. Co., 25 Or. 433 (1894); Washington v. Missouri &c. Ry. Co., 90 Tex. 319 (1897).

⁴³ Central Branch Union Pacific R. R. Co. v. Pate, 21 Kan. 539 (1879). Courts must take notice of that which is matter of knowledge and experience. Gaynor v. Old Colony &c. R. R. Co., 100 Mass. 203 (1868). "The proof need not be direct and positive, by someone who witnessed the occurrence and saw *how* it happened, but it must be such as shall satisfy reasonable and well-balanced minds that it resulted from the negligence of the defendant. Lehman v. City of Brooklyn, 29 Barb. 234, 236 (1869). See Illinois Central R. R. Co. v. Whalen, 42 Ill. 396 (1866); Chicago &c. R. R. Co. v. Packwood, 59 Miss. 280 (1881).

hold that to be sufficient or satisfactory which ordinarily satisfies an unprejudiced mind.⁴⁴

§ 176. **Essentials of proof in actions by servants.**— In actions by servants against masters to recover damages for personal injuries received while in the master's employment, either from unsuitable or defective machinery or appliances, or from not being provided with a safe and suitable place in which to work, to entitle him to recover, he must affirmatively establish: *First*. That the machine or appliance was unsuitable or defective, or that the place was unsafe or dangerous. *Second*. That the master had knowledge or notice, actual or presumptive, or ought to have known such fact, *i. e.*, that the danger was one which was known to, or might reasonably have been apprehended by, the defendant. *Third*. That the servant did not know and had not equal means with the master of knowing such fact. *Fourth*. An injury resulting therefrom as the proximate cause.⁴⁵ *Fifth*. In those courts in which the burden of proof is on the plaintiff to show freedom from contributory negligence; that he was himself free from fault and in the exercise of ordinary care. When the action is brought by servants who are deficient in understanding, either from age, training or experience, proof should be made that the danger was one which, by the exercise of the faculties and understanding of the servant, when directed to the thing he was commanded to do, was not open to his observation and apprehension,⁴⁶ and that the master did not give

⁴⁴ Gandy v. Chicago &c. R. R. Co., 30 Iowa, 421 (1870), approved by Miller, J., in Garrett v. Chicago &c. R. R. Co., 36 id. 123 (1872).

⁴⁵ Reardon v. New York Consolidated Card Co., 19 Jones & S. 134 (1884); Chicago &c. R. R. Co. v. Montgomery, 15 Ill. App. 205 (1884); Atlas Engine Works v. Randall, 100 Ind. 293, 297 (1884); Chicago &c. R. R. Co. v. Scanlan, 170 Ill. 106 (1897). See Columbus &c. Ry. Co. v. Troesch, 68 Ill. 545 (1873); 2 Thomp. Neg. 1053, § 48, 1054, note 4.

⁴⁶ Atlas Engine Works v. Ran-

dall, 100 Ind. 293, 297 (1884). In an action by a servant against his master to recover damages for personal injuries where the plaintiff claims that the injury was caused by an incompetent fellow servant, whom the master had negligently employed, the plaintiff, in order that he may recover, must show, by affirmative testimony, (1) that the accident was the result of some negligent act or omission of the fellow servant; (2) that the fellow servant was incompetent for the duty he had to perform; (3) that the fact

adequate warning and instruction to such servant of the precise nature of the dangers and risks to be encountered in such employment. It must appear by affirmative proof on the part of the employe that the employer has failed in the exercise of reasonable care, in providing safe and suitable appliances and machinery, or a safe place in which to do his work; and if it does not so appear from the evidence, the employe will be nonsuited.⁴⁷ The liability of the master for injuries to the servant received in the service is based upon his personal negligence, and the evidence must establish some personal fault or neglect of duty on his part, or what is equivalent thereto, in order to justify a verdict. The master is entitled to the presumption that he has performed this duty until the contrary is made to appear.⁴⁸ The mere fact of injury received by the servant raises no presumption of negligence on the part of the master,⁴⁹ nor is negligence presumed from the proof of a condition of facts, and that injury followed, without something to connect the facts as causing the injury. The injury alone does not necessarily prove its connection as effect of the preceding facts.⁵⁰

of his incompetency was known to the defendant when he was employed, by reason of the fellow servant having a reputation for incompetency, or that the defendant had knowledge of the incompetency during the employment and before the accident. *Green, J., in Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228 (1896).

⁴⁷ *Fenderson v. Atlantic City R. R. Co.*, 27 Vr. 708 (1894). The burden of proof is on the servant to prove the negligence which was the proximate cause of his injury. *Brownfield v. Chicago & C. Ry. Co.*, 107 Iowa, 254 (1899).

⁴⁸ *O'Brien, J., in Crown v. Orr*, 140 N. Y. 450, 453 (1893). "A recovery in these cases must rest upon affirmative evidence of some violation or neglect of duty. The burden is upon the plaintiff to

negative the presumption in favor of his employer, and it is not enough that he show an injury sustained, but he must go further and show some specific act of negligence." *Gray, J., in Soderman v. Kemp*, 145 N. Y. 427, 434 (1895); *Wojciechowski v. Spreckels Sugar Refining Co.*, 177 Pa. St. 57 (1896).

⁴⁹ *Knight v. Cooper*, 36 W. Va. 232 (1892); *Stewart v. Ohio River R. R. Co.*, 40 id. 188 (1895); *Philadelphia & C. R. R. Co. v. Hughes*, 119 Pa. St. 301 (1888); *Joliet Steel Co. v. Shields*, 146 Ill. 603 (1893). The fact that the accident happened cannot be taken as evidence of the master's negligence. *Chicago & C. R. R. Co. v. Kellogg*, 55 Neb. 748 (1898).

⁵⁰ *Gulf & C. Ry. Co. v. Kizziah*, 86 Tex. 81 (1893).

§ 177. **Proof of specific acts of negligence by servants.**— It is competent to prove *specific* acts of negligence or unskillfulness of servants for the purpose of showing that the master did not exercise due care, prudence and caution in the employment of, or in retaining in his service, careful, prudent and skillful persons to manage and conduct his business. It is also competent for the purpose of charging the defendant with notice of the incompetency of such servants. It may also be shown that such acts were known to the defendant prior to the employment of such persons; or that such servants were retained in his service after notice of such *specific* acts of negligence or unskillfulness.⁵¹

§ 178. **The same subject continued — The rule in Pennsylvania.**— The opposite ruling has been made by the Supreme Court of Pennsylvania — although it has never been approved or sanctioned by other courts — where it was held that character for care and skill, though growing out of the special acts of a party or servant, cannot be established by proof of such acts, but by evidence of general reputation, Lowerie, Chief Justice, saying: “Character grows out of special acts, but is not proved by them.”⁵²

§ 179. **Collisions at steam railroad crossings — Proof of negligence.**— Where there has been a collision at a railroad crossing with a traveller upon the highway, and the railroad company is sued for negligence in causing the collision, its negligence is

⁵¹ Pittsburgh &c. Ry. Co. v. of a motorman is inadmissible. Ruby, 38 Ind. 294, 314 (1871). *followed and approved* by the New York Court of Appeals, in Baulec v. New York &c. R. R. Co., 59 N. Y. (1874); criticising and disapproving Frazier v. Pennsylvania R. R. Co., 38 Pa. St. 104, 110 (1860); Park v. New York &c. R. R. Co., 155 N. Y. 215 (1898). See Consolidated Coal Co. v. Seniger, 179 Ill. 370 (1899); Whart. on Neg. § 228. Not competent to show that a servant was generally careful. Wooster v. Broadway &c. R. R. Co., 72 Hun, 197 (1893). Or evidence of the general incompetency

Fonda v. St. Paul City Ry. Co. 71 Minn. 438 (1898). Evidence of the previous intoxication of the flagman stationed at a railroad crossing is immaterial. Warner v. New York Central R. R. Co., 44 N. Y. 456 (1871).

⁵² Frazier v. Pennsylvania R. R. Co., 38 Pa. St. 104, 110 (1860). *followed in* Snodgrass v. Carnegie Steel Co., 173 id. 228 (1896). See Michigan Central R. R. Co. v. Gilbert, 46 Mich. 176 (1881); 1 Thomp. on Neg. 513, § 16, note 3; 2 id. 1053, § 48, note 2.

made out, by proving a violation of the statute, if any, which creates the measure of duty, such as not ringing a bell or blowing a whistle, or a violation of a municipal ordinance, and then generally by proving all the circumstances surrounding the transaction, and submitting them, with proper instructions, to the jury. It may be proved that the collision took place in the night, in a rain storm; that the train was running fast or slow, with or without headlights; that it was backing or going forward; that it was running in a city in a crowded thoroughfare, or in the country; that there were many or few tracks; that there were obstructions, making it impossible to see the train before the crossing was reached. These circumstances are proved, not to impose upon the railroad company any duty which the law does not impose, nor any duty to do any acts collateral to the running and management of its trains in a lawful manner upon its road, but as bearing upon the question of the manner in which it has run and managed its trains. A different degree of care may be required in running trains in the dark and in the daylight, in city and country, when there are obstructions and no obstructions near crossings.⁵³

⁵³ Earl, J., in *McGrath v. New York &c. R. R. Co.*, 63 N. Y. 527 (1876). Evidence that no signboards were erected is admissible. *Heddes v. Chicago &c. Ry. Co.*, 77 Wis. 228 (1890). The Iowa statute requires railroad companies to erect conspicuous warning signs at points where a railway crosses a public highway, the companies are made liable for all damages sustained by reason of such neglect or refusal, and in order for the injured party to recover, "it shall only be necessary for him to prove such neglect or refusal." Code, § 1288. A person attempting to cross a steam railroad track has a right to presume that the railroad will give the signals of the approach of the train as required by law. *Texas &c. Ry. Co. v. Spradling*, 72 Fed. Rep. 152 (1896); 18 C. C.

A. 496. If the signals are omitted, there is a presumption that the plaintiff's injury was caused by the omission of such signals under Rev. Stats. § 806, as amended by Acts of 1881, p. 79. *Huckshold v. St. Louis &c. Ry. Co.*, 90 Mo. 548 (1886). The burden is on the railroad company to show that such omission of signals was reasonable and prudent in view of the actual condition of things at the time. *Wakefield v. Connecticut &c. R. R. Co.*, 37 Vt. 330 (1864). At grade crossing a witness familiar with the locality may testify of narrow escapes he has had, to show the nature of the crossing and the danger to travellers. *Chicago &c. Ry. Co. v. Netolicky*, 67 Fed. Rep. 665 (1895); 14 C. C. A. 615.

Where a person is killed at a railroad crossing of a highway and there is no eye-witness to the accident, the burden of proof is all important by reason of the rule of law which exacts from the traveller the duty to look and listen, and in some jurisdictions, such as Pennsylvania, to stop, look and listen, before attempting to cross, or the traveller will not be in the exercise of ordinary care and will be guilty of contributory negligence, and there can be no recovery for causing the death. But a plaintiff's administrator is not required, in all cases, to prove affirmatively that his intestate, who has been killed at a railroad crossing, looked or listened for approaching trains.⁵⁴ As was pointed out in a previous section, the courts are not in harmony on this point. Thus, in some of the States, it has been held the fact that a person travelling on a highway and coming in collision with a train on a railway crossing is of itself sufficient to suggest a presumption of contributory negligence.⁵⁵ In other States it has been held that the presumption is, that the decedent observed the precautions which the law prescribed and did in fact, look and listen.⁵⁶ And still in other States it has been

⁵⁴ *Hendrickson v. Great Northern Ry. Co.*, 49 Minn. 245 (1892); an argument or mode of reasoning upon evidence." *Id.* 67.

Evans v. Concord R. R. Co., 66 N. H. 194 (1890); *McNamara v. New York Central R. R. Co.*, 136 N. Y. 650 (1892); *Cleveland &c. R. R. Co. v. Crawford*, 24 Ohio St. 631 (1874). ⁵⁶ Alabama: *S. P., Bromley v. Birmingham &c. R. R. Co.*, 95 Ala. 403 (1891).

Delaware: *Martin v. Baltimore &c. R. R. Co.*, 2 Marvel, 123 (1895, Del.).

⁵⁵ Indiana: *Indiana &c. R. R. Co. v. Greene*, 106 Ind. 279 (1885). Illinois: *McNulta v. Lockeridge*, 137 Ill. 270 (1891).

Maine: *Prima facie* guilty of negligence. *State v. Maine Central R. R. Co.*, 76 Me. 357 (1884). General character and habits of a traveller for care is not admissible. *Chase v. Maine Central R. R. Co.*, 77 Me. 62 (1885). In such cases the natural instinct of self-preservation does not afford proof of the absence of contributory negligence on the part of the traveller. "It may give character or force to facts already proved, but it does not, of itself, add or create proof. It is rather

Michigan: *Myunning v. Detroit &c. R. R. Co.*, 64 Mich. 93 (1887). Missouri: *Petty v. Hannibal &c. Ry. Co.*, 88 Mo. 306 (1885).

Oregon: *McBride v. Northern Pac. R. R. Co.*, 19 Or. 64 (1890).

Pennsylvania: *Schum v. Pennsylvania R. R. Co.*, 107 Pa. St. 8 (1884); *Pennsylvania R. R. Co. v. Weber*, 76 id. 157 (1874); *Weiss v. Pennsylvania R. R. Co.*, 79 id. 387 (1875).

Virginia: *Southern Ry. Co. v. Bryant*, 95 Va. 212 (1897). The

held that there is no presumption either way, *i. e.*, of negligence as against either party, except such as arises upon the facts proved.⁵⁷ But many cases hold that proof that a person killed by a train at a railroad crossing could have seen the train, if he had looked and listened, is conclusive of his contributory negligence.⁵⁸ And the plaintiff must show that he did his duty in this respect, or prove facts from which the inference can reasonably be drawn that he did.⁵⁹

§ 180. **Essentials of proof in actions against municipalities for defective highways.**—In an action against a municipality for injuries caused by a defect in the highway to a traveller thereon, showing the mere existence of a defect from which the traveller sustained injury, does not, independently of negligence, establish a breach of duty on the part of the municipality for which it is liable.⁶⁰ But the plaintiff must show by evidence, in addition to the breach of duty which it was the plaintiff's right to have performed for his safety and protection, that the corporation caused it, or illegally assented to its creation, by another, in which case the municipality is liable without notice.⁶¹ If the municipality did not cause the defect, or assent to its creation, the plaintiff must allege and prove notice to, and demand of, the municipality under the statute, as essential elements, as part of his case;⁶² or, in lieu of actual notice, that the defect

presumption, though slight, is that the traveller did his duty in approaching the track

⁵⁷ Kentucky: Louisville &c. R. R. Co. v. Goetz, 79 Ky. 442 (1882).

New York: It is only where it appears from the evidence that the traveller might have seen had he looked, or might have heard had he listened, that a jury, in the absence of evidence upon the question, is authorized to find that he did not look and did not listen. *Smedis v. Brooklyn &c. R. R. Co.*, 88 N. Y. 13 (1882).

⁵⁸ *Tucker v. New York &c. R. R. Co.*, 124 N. Y. 308 (1891); *Connerton v. Delaware &c. Co.*, 169 Pa. St. 339 (1895); *Chicago &c.*

Ry. Co. v. Hedges, 118 Ind. 5 (1888); *Moore v. Keokuk &c. Ry. Co.*, 89 Iowa, 223 (1893); *Groesbeck v. Chicago &c. Ry. Co.*, 93 Wis. 505 (1896).

⁵⁹ *Tucker v. New York &c. R. R. Co.*, 124 N. Y. 308 (1891).

⁶⁰ *Hunt v. Mayor &c. of New York*, 109 N. Y. 134 (1888).

⁶¹ *Turner v. City of Newburgh*, 109 N. Y. 301 (1888); *Wilson v. City of Troy*, 135 id. 96 (1892).

⁶² *Reining v. City of Buffalo*, 102 N. Y. 308 (1886); *Foley v. New York*, 1 App. Div. 586 (1896); 37 N. Y. Supp. 465; *Dorsey v. City of Racine*, 60 Wis. 292 (1884); *Maddox v. County of Randolph*, 65 Ga. 216 (1880). In Vermont the notice is

was so notorious as to be evident to all persons passing.⁶³ It is no defense to an action against a city for an injury, caused by its negligence to repair a street, that the city has no funds on hand for that purpose.⁶⁴ But the absence of the necessary funds and of the legal means of procuring them, will excuse the non-performance of this duty, such absence of means should be shown as a defense.⁶⁵

§ 181. **Presumptions of negligence — Res ipsa loquitur.**—The general rule of law is that the mere proof of the occurrence of an accident does not raise a presumption of negligence,⁶⁶ expressed by the phrase *res ipsa loquitur*. But when the testimony which proves the occurrence by which the plaintiff was injured, discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented which calls for a defense.⁶⁷ Negligence must be proved; it will not

held to be no part of the cause of action but pertains merely to the remedy and evidence. *Kent v. Town of Lincoln*, 32 Vt. 591 (1860). *Contra*, under act of 1870, notice by husband alone, of injury to wife and claim for damages is sufficient. *Babcock v. Town of Guilford*, 47 Vt. 519 (1875). In Massachusetts the notice cannot be waived under Stat. of 1877, chap. 224. *Gay v. City of Cambridge*, 128 Mass. 387 (1880). See *Hughes v. City of Fond du Lac*, 73 Wis. 380 (1889).

⁶³ *Burns v. City of Bradford*, 137 Pa. St. 361 (1891). On this general subject see *Elliott on Roads & Streets*, 638 *et seq.* The authorities recognize two kinds of notice, actual and constructive; notice imparted by the nature of the work itself, or given to some officer of the municipality, may be considered as actual notice, while notice inferred from lapse of time or other circumstances may be considered as constructive notice. *El-*

liott on Roads & Streets, 645; *District of Columbia v. Payne*, 13 App. Cas. (D. C. 1898).

⁶⁴ *Evanston v. Gunn*, 99 U. S. 660 (1878); *Erie City v. Schwingle*, 22 Pa. St. 384 (1853); *Shartle v. City of Minneapolis*, 17 Minn. 308 (1871).

⁶⁵ *Hines v. City of Lockport*, 50 N. Y. 236 (1872). See *Eveleigh v. Hainshead*, 34 Hun, 140 (1884).

⁶⁶ *Bahr v. Lombard & Co.*, 24 Vr. 233 (1890); *Excelsior Electric Co. v. Sweet*, 28 id. 224 (1894); *Lawson on Law of Presumptive Evidence*, pp. 121-134. But this rule is not to be confounded with the rule which declares that negligence may be inferred from facts and circumstances (§ 174), for the rules are separate and distinct and there is no conflict between them. *Elliott on Roads & Streets*, 639.

⁶⁷ *Bahr v. Lombard & Co.*, 24 Vr. 233 (1890); *Excelsior Electric Co. v. Sweet*, 28 id. 224 (1894); *Seybolt v. New York & C. R. R. Co.*, 95 N. Y. 562 (1884).

be presumed.⁶⁸ There are seeming exceptions to this rule and a class of cases in which, either from the legal relation of the parties, one to the other, such as exists between passenger and carrier, or from the nature of the cause or event producing or inflicting the injury, such as injuries to persons from explosions, or injuries on the streets caused by obstructions, excavations and the like; proof of the injury, with its attendant circumstances, by the plaintiff, raises a presumption of fact that the injury was caused by negligence, which casts upon the defendant the burden of satisfactorily explaining the cause which produced the injury.⁶⁹

§ 182. Presumptions of negligence — Common carriers of passengers.— As applied to carriers of passengers, especially in conveyances propelled by steam, electricity, or compressed air, where the consequences of an accident are frequently fatal to human life, it is said that such a rule is a reasonable one, be-

⁶⁸ See § 168; *East End Oil Co. v. Pennsylvania Torpedo Co.*, 190 Pa. St. 353 (1899); *Keegan v. Western R. R. Co.*, 8 N. Y. 175 (1853); *Lyndsay v. Connecticut &c. R. R. Co.*, 27 Vt. 643 (1855); *McGrell v. Buffalo Office Building Co.*, 153 N. Y. 265, 273 (1897); *Palmer v. New York &c. R. R. Co.*, 112 id. 245 (1889); *Jacksonville Street Ry. Co. v. Chappell*, 21 Fla. 175 (1885). Nor will it be presumed that a person will violate the law. *International &c. Co. v. Gray*, 65 Tex. 32 (1885).

⁶⁹ *Thompson on Neg.* (vol. 2), p. 1227, § 3; *Ray on Negligence of Imposed Duties*, § 188; *Shearm. & Redf. on Neg.* (5th ed.) §§ 59, 60; *Louisville &c. Ry. Co. v. Snyder*, 117 Ind. 435 (1888). Mr. Thomas, in his book on *Negligence*, at page 574, says the rule that negligence must be proved "is of very general applica-

tion, and the exceptions to it are limited, and may be classified under two heads: (1) When the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; (2) where the injury arises from some condition or event that is, in its very nature, so obviously destructive of the safety of person or property, and is so tortious in its quality, as in the first instance, at least, to permit no inference, save that of negligence on the part of the person in the control of the injurious agency. This second class principally concerns injuries to people in the street from flying or falling missiles, obstructions, excavations and the like, but it may also include casualties in any relation where the elements stated in the definition are present."

cause the carrier has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury and of explaining how it occurred, while, as a general rule, the passenger is destitute of all knowledge that would enable him to present the facts and fasten negligence on the company in case it really existed. Any other rule would practically absolve railway carriers from liability in a great majority of cases, for the passenger would seldom be able to ascertain the real cause of the accident.⁷⁰ "As the cars and the track are within the exclusive possession and control of the company, it is incumbent upon it to explain the cause of an accident, it not being ordinarily in the power of the passengers to do so. Cars can ordinarily be run with safety, and when they are not, that fact itself is evidence of fault or defect somewhere, requiring explanation. The maxim *res ipsa loquitur* applies in such a case."⁷¹ One reason for this rule is said to be that, when an event takes place which, according to the ordinary course of things, would not happen if proper care was exercised, it is presumed that such care was not exercised.⁷² Mr. Justice Ruggles said: "It is incorrect to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. The presumption arises from the *cause* of the injury, or from other circumstances attending it, and not from the injury itself."⁷³ The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence, from which it may be inferred by the jury.⁷⁴

⁷⁰ Delaware &c. R. R. Co. v. Naphys, 90 Pa. St. 135, 141 (1879); son v. Giant Powder Co., 107 Cal. 549 (1895).

Terre Haute &c. R. R. Co. v. Buck, 96 Ind. 346, 364 (1884); Bridges v. Co., 12 N. Y. 236, 237 (1855).
North London R. R. Co., L. R., 6 "Something in the facts that
Q. B. 377, 391 (1871); Ray on Neg., speaks of the negligence of the de-
p. 146; Thompson on Neg. (vol. 2), fendant." Bahr v. Lombard &c.
p. 1227; Smith on Neg. p. 246. Co., 24 Vr. 233 (1890); Kaples v.
Orth, 64 Wis. 535 (1884).

⁷¹ Peters, J., in Stevens v. European &c. Ry. Co., 66 Me. 74, 76 (1876).
⁷⁴ Mitchell, J., in East End Oil Co. v. Pennsylvania Torpedo Co.,

⁷² Caldwell v. New Jersey Steam-boat Co., 47 N. Y. 282 (1872); Jud- 190 Pa. St. 353 (1899).

§ 183. Illustrative cases — Applications of the rule.— As applied to carriers of passengers,⁷⁵ the rule *res ipsa loquitur* has

⁷⁵ England : From the breaking of an axle-tree of a coach. *Christie v. Griggs*, 2 Campb. 79 (1809); *Great Western Ry. Co. v. Braid*, 1 Moore P. C. (N. S.) 101 (1863). Carriage breaking down or running off the rails. *Dawson v. Manchester &c. Ry. Co.*, 7 Hurlst. & N. 1037 (1862); *Skinner v. London &c. Ry. Co.*, 5 Exch. 787 (1850); *Gee v. Metropolitan Ry. Co.*, L. R., 8 Q. B. 161 (1873); *Smith v. Robertson*, L. R., 8 Vict. 256 (1882).

United States: Upsetting of a stage coach. *Stokes v. Saltonstall*, 13 Pet. 181 (1839). Train coming in collision with landslide. *Gleeson v. Virginia &c. R. R. Co.*, 140 U. S. 435 (1890).

Alabama: Derailment of a car. *Alabama &c. R. R. Co. v. Hill*, 93 Ala. 514 (1890). Car turned over. *Montgomery &c. R. R. Co. v. Mallette*, 92 Ala. 209 (1890). Two cars colliding. *Georgia Pacific Ry. Co. v. Love*, 91 Ala. 432 (1890); *Louisville &c. R. R. Co. v. Jones*, 83 id. 376 (1887).

Arkansas: Broken rail, car thrown from the track. *George v. St. Louis &c. Ry. Co.*, 34 Ark. 613 (1879). Car leaving track. *Eureka Springs Ry. Co. v. Timmons*, 51 Ark. 459 (1888). Broken rail and defective crosstie, derailing train. *Arkansas &c. Ry. Co. v. Griffith*, 63 Ark. 491 (1897).

California: Overturning of a coach. *Boyce v. California Stage Co.*, 25 Cal. 460 (1864). Train running off of the track. *Mitchell v. Southern Pacific R. R. Co.*, 87 Cal. 62 (1890); *McCurrie v. Southern Pacific Co.*, 122 id. 558 (1898).

Colorado: Overturning of a car.

Denver &c. Ry. Co. v. Woodward, 4 Colo. 1 (1877). Giving way of a bridge. *Kansas Pacific Ry. Co. v. Miller*, 2 Colo. 442 (1874); *Wall v. Livesay*, 6 id. 465 (1882); *Sanderson v. Frazier*, 8 id. 79 (1884). When the fact is established that an injury has been inflicted upon a passenger by escaping electricity a *prima facie* case of negligence is established. *Denver Tramway Co. v. Reid*, 4 Colo. App. 53 (1893); *Eickhof v. Chicago &c. Ry. Co.*, 77 Ill. App. 196 (1898).

Connecticut: *Donovan v. Hartford Street Ry. Co.*, 65 Conn. 201 (1894); *Fuller v. Naugatuck R. R. Co.*, 21 id. 557 (1852).

Georgia: *Augusta &c. R. R. Co. v. Randall*, 79 Ga. 304 (1887).

Illinois: Breaking of a car wheel. *Toledo &c. Ry. Co. v. Beggs*, 85 Ill. 80 (1877). Car thrown from the track. *Peoria &c. R. R. Co. v. Reynolds*, 88 Ill. 418 (1874). Falling of a stage plank placed for the use of passengers landing from a steamboat. *Eagle Packet Co. v. Defries*, 94 Ill. 598 (1880); *New York &c. R. R. Co. v. Blumenthal*, 160 Ill. 40 (1896).

Indiana: Collision of two trains operated by defendant. *Sherlock v. Alling*, 44 Ind. 184 (1873). Breaking of a rail. *Cleveland &c. Ry. Co. v. Newell*, 75 Ind. 542 (1881). Train brought to a full stop on a dangerous trestle-work. *Terre Haute &c. R. R. Co. v. Buck*, 96 Ind. 346 (1884). Train breaking through a bridge. *Bedford &c. R. R. Co. v. Rainbolt*, 99 Ind. 551 (1884). Car thrown from track and upset. *Pittsburgh &c. R. Co. v. Williams*, 74 Ind. 462

been applied by the courts in many cases. In Georgia, this is

(1881); 104 id. 264 (1885). Servant of carrier injured a passenger. *Memphis &c. Packet Co. v. McCool*, 83 Ind. 392 (1882). Falling of a bridge. *Louisville &c. Ry. Co. v. Schneider*, 117 Ind. 435 (1888); *Louisville &c. Ry. Co. v. Pedigo*, 108 id. 481 (1886). Collision. *Louisville &c. R. R. Co. v. Taylor*, 126 Ind. 126 (1890).

Iowa: Separation of train. *Tuttle v. Chicago &c. Ry. Co.*, 48 Iowa, 236-239 (1878); *Pershing v. Chicago &c. Ry. Co.*, 71 id. 561 (1887).

Kansas: Derailment of a train. *Southern Kansas Ry. Co. v. Walsh*, 45 Kan. 653 (1891).

Kentucky: Collision with a car. *Louisville &c. R. R. Co. v. Ritter*, 85 Ky. 368 (1887).

Maine: Cars running off the track. *Stevens v. European &c. Ry. Co.*, 66 Me. 74 (1876).

Maryland: Baltimore &c. R. R. Co. v. State, 63 Md. 135 (1884); *Yorktown Turnpike Co. v. Leonhardt*, 66 id. 70 (1886).

Massachusetts: Car running off the track. *Feital v. Middlesex R. R. Co.*, 109 Mass. 398 (1872). From the fall of a shade of a lamp affixed to the upper part of a car. *White v. Boston &c. R. R. Co.*, 144 id. 404 (1887).

Michigan: See *Mitchell v. Chicago &c. Ry. Co.*, 51 Mich. 236, 238 (1883).

Minnesota: *Wilson v. Northern Pacific R. R. Co.*, 26 Minn. 278 (1879). Case of street railway. *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1 (1884).

Mississippi: *New Orleans &c. R. R. Co. v. Albritton*, 38 Miss. 242 (1859).

Missouri: Derailment of a car. *Norton v. St. Louis &c. Ry. Co.*, 40 Mo. 642 (1860); *Furnish v. Missouri Pacific Ry. Co.*, 102 id. 438 (1890). Breaking of a paddle-wheel of a steamboat. *Yerkes v. Keokuk &c. Packet Co.*, 7 Mo. App. 265 (1879).

Nebraska: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890 (1893).

New Jersey: A "lurch" or "jerk" occurred as would have been unlikely to occur if proper care had been exercised. *Consolidated Traction Co. v. Thalheimer*, 30 Vr. 474 (1896). Conductor stumbled, injuring passenger. *Whalen v. Consolidated Traction Co.*, 32 Vr. 606 (1898).

New York: Something striking against the side of a car. *Holbrook v. Utica &c. R. R. Co.*, 12 N. Y. 236 (1855). Spreading and breaking of rails. *Curtis v. Rochester &c. R. R. Co.*, 18 N. Y. 534 (1859). Crack in the iron axle of a car. *Alden v. New York Central R. R. Co.*, 26 N. Y. 102 (1862). Car running off the track. *Edgerton v. New York &c. R. R. Co.*, 39 N. Y. 227 (1868). Explosion of the boiler in a steamboat. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 291 (1872); *Carroll v. Staten Island R. R. Co.*, 58 id. 126 (1874). Broken axle. *Seybolt v. New York &c. R. R. Co.*, 95 N. Y. 562 (1884). Passenger's arm struck by swinging door of a passing freight car. *Breen v. New York Central &c. R. R. Co.*, 109 N. Y. 297 (1888). Overturning of car on the track. *Webster v. Rome &c. R. R. Co.*, 115 N. Y. 112 (1889). Breaking of apparatus wholly under defendant's

so by statute.⁷⁶ In Mississippi, the statute is limited to suits by those who, being neither shippers nor passengers, have been injured in their persons or property.⁷⁷ Such a presumption of negligence does not arise where the accident is shown to have been caused by the act of God,⁷⁸ or where the cause of the accident by which the passenger was injured is known as well to the passenger as to the carrier,⁷⁹ or at stations, passengers

control. *Miller v. Ocean SS. Co.*, 118 N. Y. 199 (1890).

North Carolina: Collision of two passenger trains on the same track. *Kinney v. North Carolina R. R. Co.*, 122 No. Car. 961 (1898).

Ohio: *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418 (1881). Fall of a berth in a sleeping car. *Cleveland &c. R. R. Co. v. Walrath*, 38 Ohio St. 461 (1882).

Pennsylvania: *Laing v. Colder*, 8 Pa. St. 479, 483 (1848); *Pittsburgh &c. R. R. Co. v. Pillow*, 76 id. 510 (1874). A collision or defect in any part of the machinery. *Delaware &c. R. R. Co. v. Napheys*, 90 Pa. St. 135 (1879). Defective bridge. *Philadelphia &c. R. R. Co. v. Anderson*, 94 Pa. St. 351 (1880).

Texas: *Texas &c. Ry. Co. v. Suggs*, 62 Tex. 323 (1884); *Texas &c. Ry. Co. v. Kirk*, id. 227 (1884). See *San Antonio &c. R. R. Co. v. Robinson*, 73 id. 277 (1889).

Virginia: Overturning of train. *Baltimore &c. R. R. Co. v. Wightman*, 29 Gratt. 431 (1877); *Baltimore &c. R. R. Co. v. Noell*, 32 id. 394 (1879). See Redf. on Carr., § 341; 2 Greenl. on Ev., § 227; *Cooley on Torts*, pp. 660, 663; *Shearm. & Redf. on Neg.* (5th ed.), § 516; *Thomas on Neg.* 574; *Ray on Negligence of Imposed Duties*, § 188.

⁷⁶ Georgia: Code 1882, p. 760, § 3033; *Central R. R. Co. v. Brin-*

son, 64 Ga. 475, 479 (1880); *Savannah &c. Ry. Co. v. Stewart*, 71 id. 427 (1883). "The company may rebut the presumption and relieve itself by showing that its agents have exercised all ordinary and reasonable care and diligence to avoid the injury, or it may show that the damage was caused by the plaintiff's own negligence, or it may further show that the plaintiff, by ordinary care, could have avoided the injury to himself." *Crawford, J. Ib.*; *Central R. R. Co. v. Sanders*, 73 Ga. 513 (1884); *Central R. R. Co. v. Freeman*, 75 id. 331 (1885); *Augusta &c. R. R. Co. v. Randall*, 79 id. 304 (1887); *East Tenn. &c. R. R. Co. v. Hartley*, 73 id. 5 (1884).

⁷⁷ *Chicago &c. R. R. Co. v. Trotter*, 60 Miss. 442 (1882); *Rev. Code of Miss. 1880*, p. 310, § 1059. The burden imposed by the statute upon the railroad company, after proof of the injury, to show the exercise of proper care, is not met by simply proving that the whistle was heard blowing at the time of the accident. *Mobile &c. R. R. Co. v. Dale*, 61 Miss. 206 (1883).

⁷⁸ *Gleeson v. Virginia &c. R. R. Co.*, 5 Mackey, 356 (1887). A landslide in a railway cut is not an "act of God." *Gleeson v. Virginia &c. R. R. Co.*, 140 U. S. 435 (1890).

⁷⁹ *Fearn v. West Jersey Ferry Co.*, 143 Pa. St. 122 (1891). From

embarking or alighting.⁸⁰ Before such a presumption of negligence arises, it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business, or in the appliances of transportation.⁸¹ A good reputation upon the part of the builder of a railway equipment selected is no defense to a carrier for an injury to a passenger and will not be accepted, and ought not to be accepted by the public as a substitute for good material or good work.⁸² The carrier must show that the accident was produced by causes wholly beyond his control.⁸³

the mere existence of snow during a storm on the deck of a ferry-boat.

⁸⁰ Ray on Negligence of Imposed Duties, § 188e; *Welfare v. London &c. R. R. Co.*, L. R., 4 Q. B. 693 (1869); *Haynan v. Pennsylvania R. R. Co.*, 118 Pa. St. 508 (1888); *East Tennessee &c. R. R. Co. v. Mitchell*, 11 Heisk. 400 (1872); *Delaware &c. R. R. Co. v. Napheys*, 90 Pa. St. 135 (1879); *Pennsylvania Co. v. Marion*, 104 Ind. 239 (1885); *Chicago &c. R. R. Co. v. Trotter*, 60 Miss. 442 (1882); *Mitchell v. Chicago &c. R. R. Co.*, 51 Mich. 236 (1883).

⁸¹ *Thomas v. Philadelphia &c. R. R. Co.*, 148 Pa. St. 180 (1892); *Pennsylvania R. R. Co. v. MacKinney*, 124 id. 462 (1889); *Louisville &c. R. R. Co. v. Jones*, 83 Ala. 376 (1887).

⁸² Ray on Negligence of Imposed Duties, § 17; *Grote v. Chester &c. Ry. Co.*, 2 Exch. 251 (1848); *Louisville &c. R. R. Co. v. Snyder*, 117 Ind. 435 (1888); *Hegeman v. Western R. R. Co.*, 13 N. Y. 9 (1855).

⁸³ *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890 (1893). It is a question of fact for the jury to decide, whether upon the evidence a railroad company is guilty

of negligence in not ascertaining the utility of, and adopting an improvement to protect passengers from injuries by accident to which the cars are liable. *Hegeman v. Western R. R. Co.*, 13 N. Y. 9 (1855). But a railroad company cannot be required to adopt any particular method of construction, or any particular contrivance or device, in order to be in the exercise of ordinary care. *Chicago &c. R. R. Co. v. Driscoll*, 176 Ill. 330, 334 (1898). Negligence will not be presumed from the fact of injury to an employe, but it must be shown, since the rule applicable in case of injury to passengers does not apply to an employe under section 1059, Code 1880. *Short v. New Orleans &c. R. R. Co.*, 69 Miss. 848 (1892); *Knight v. Cooper*, 36 W. Va. 232 (1892); *Stewart v. Ohio River R. R. Co.*, 40 id. 188 (1895); *Brownfield v. Chicago &c. Ry. Co.*, 107 Iowa, 254 (1899). There was no presumption of negligence in the following cases: Passenger in a street car thrown down by the starting of the car before he was seated. *Jacksonville Street Ry. Co. v. Chappell*, 21 Fla. 175 (1885). From a collision of a street railway car with a wagon in the

§ 184. Presumptions of negligence in cases other than those of common carriers.— There is a class of cases in which it is said that the mere proof of the fact that the accident happened and a consequent injury to the plaintiff, without more, will not raise a presumption of negligence on the part of the defendant, except in *contractual* relations, such as exists between passenger and carrier.⁸⁴ But the plaintiff must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence. Mr. Justice Garrison, of the Court of Errors and Appeals of New Jersey, has said: "The existence of such a rule is among the unsettled matters of the law, being asserted in guarded terms in some jurisdictions and emphatically denied in others."⁸⁵ Negligence is *prima facie* presumed from the fact of the explosion of a nitro-glycerine factory, in the absence of evidence showing care on the part of the employees. The *prima facie*

street. Federal Street &c. Ry. Co. 312 (1865). Nor for the killing of v. Gibson, 96 Pa. St. 83 (1880); a trespasser on trains—boy stealing a ride on a train. Sommers v. Potts v. Chicago City Ry. Co., 33 Fed. Rep. 610 (1887); Quinlan v. Mississippi &c. R. R. Co., 7 Lea, Sixth Ave. R. R. Co., 4 Daly, 488 201 (1881).
 (1873). Or with a locomotive at a street-car crossing. Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578 (1888). A passenger stumbling over an obstruction in the car. Farley v. Philadelphia Traction Co., 132 Pa. St. 58 (1890). From a clothes-wringer falling out of the parcel rack, which was placed there by another passenger. Morris v. New York &c. R. R. Co., 106 N. Y. 678 (1887). From clothes catching in a broken spring-hook on an open railway car. Kelly v. New York &c. R. R. Co., 109 N. Y. 44 (1888). While alighting from front platform for passing to rear platform on a street car. Brown v. Congress &c. Ry. Co., 49 Mich. 153 (1882). While driving off of a ferry-boat, sleigh striking against the drop of the slip. Le Barron v. East Boston Ferry Co., 11 Allen, 84 Thompson on Neg. (vol. 2) 1227; Pollock on Torts, 636; Cosulich v. Standard Oil Co., 122 N. Y. 118, 128 (1890); Stearns v. Ontario Spinning Co., 184 Pa. St. 519 (1898); 3 Am. Neg. Rep. 485, note. Cases will be found there collected on the doctrine of *res ipsa loquitur*. See Denver Consolidated Electric Co. v. Simpson, 21 Colo. 371 (1895); Judson v. Giant Powder Co., 107 Cal. 556 (1895).
⁸⁵ Bahr v. Lombard &c. Co., 24 Vr. 233, 239 (1890). It has been said that if it is necessary to introduce extrinsic evidence to establish the fact that the defendant caused the injury, the doctrine of *res ipsa loquitur* does not apply. Hygienic Plate Ice Mfg. Co. v. Raleigh &c. R. R. Co., 122 No. Car. 881 (1898).

case of negligence arising from the fact of the explosion is strengthened and made complete by expert testimony to the effect that, if the factory was properly conducted and the employes were careful during the process of manufacturing, an explosion would not occur.⁸⁶ The presumption of negligence which arises from the proof of the injury, with its attendant circumstances, is a rule of evidence. It is not conclusive, and may be rebutted by the defendant.⁸⁷ Whether the evidence meets and rebuts the presumption of negligence is for the jury.⁸⁸ There is a distinction between a *prima facie* case which is made out by certain proved facts and a presumption of law arising from a given state of facts.⁸⁹

§ 185. **Illustrative cases — Applications of the rule.**— As applied to cases other than the carrier of passengers, a presumption of negligence has been held to arise from the facts proved in many cases.⁹⁰ Thus the bare fact that gas escaped

⁸⁶ *Judson v. Giant Powder Co.*, 107 Cal. 549 (1895). The reason of the rule is not founded in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. *Id.* 556. See *Schoepper v. Hancock Chemical Co.*, 113 Mich. 582 (1897).

⁸⁷ *Great Western Ry. Co. v. Braid*, 1 Moore P. C. (N. S.) 101 (1863); *Denver &c. Ry. Co. v. Woodward*, 4 Colo. 1 (1877); *Wabash &c. R. R. Co. v. Koenigsam*, 13 Ill. App. 505 (1883); *Philadelphia &c. R. R. Co. v. Anderson*, 94 Pa. St. 351 (1880); *Toledo &c. Ry. Co. v. Beggs*, 85 Ill. 80 (1877); *Bedford &c. R. R. Co. v. Rainbolt*, 99 Ind. 551, 558 (1884); *Cooley on Torts*, p. 663.

⁸⁸ *Eldridge v. Minnesota &c. Ry. Co.*, 32 Minn. 253 (1884); *Kenney v. Hannibal &c. R. R. Co.*, 80 Mo. 573 (1883).

⁸⁹ *Henry, J., in Kenney v. Hannibal &c. R. R. Co.*, 80 Mo. 573, 578 (1883). For a discussion of what facts constitute a *prima facie* case and the shifting of the burden of proof, see *Gannon v. Laclede Gas Light Co.*, 145 Mo. 502 (1898).

⁹⁰ From obstructions, excavations, etc., in streets, failure to keep a building adjoining a street safe. *Vincent v. Cook*, 6 Thomp. & C. 562; 4 Hun, 318 (1875); *Mullen v. St. John*, 57 N. Y. 567 (1874). From the fall of a wall of a cistern which fell by its own weight. *Mulcairns v. City of Jamesville*, 67 Wis. 24 (1886). Telegraph wire left swinging across a public street. *Western Union Tel. Co. v. State*, 82 Md. 293 (1896); *Haynes v. Raleigh Gas Co.*, 114 No. Car. 203 (1894); *Thomas v. Western Union Tel. Co.*, 100 Mass. 156 (1868); *Larson v. Central R. R. Co.*, 56 Ill. App. 263 (1893); *Sheldon v. Western Union Tel. Co.*, 51 Hun, 591 (1889); *Denver Con-*

from the defendant's pipe is *prima facie* evidence of some neglect on its part, from which a jury is at liberty to draw the

solidated Electric Co. v. Simpson, 21 Colo. 371 (1895). Fall of a broken bolt from an elevated railway into the street. Volkmar v. Manhattan Ry. Co., 134 N. Y. 418 (1892); Hogan v. Manhattan Ry. Co., 149 id. 23 (1896). Bursting of a cylinder falling into the street. *Contra*, cinder or hot coal from locomotive on elevated railway. Weidmer v. New York & C. R. Co., 114 N. Y. 462 (1889); Searles v. Manhattan Ry. Co., 101 id. 661 (1886). See Lowery v. Manhattan Ry. Co., 99 id. 158 (1885). Guy rope sagged across the public street. See Geer v. Darrow, 61 Conn. 220 (1891). Electric light wire. See Brush Electric Co. v. Kelley, 126 Ind. 220 (1890); Snyder v. Wheeling Electrical Co., 43 W. Va. 661 (1897). Fall of an electric light hanging over a street. Excelsior Electric Co. v. Sweet, 28 Vr. 224 (1894). Fall of an elevator killing employe who had charge of same. See Fairbank Canning Co. v. Innes, 24 Ill. App. 33; 125 Ill. 410 (1888). Lamp projecting over a highway; the fastening by which the lamp was attached to the lamp-iron was in a decayed state. Tarry v. Ashton, 1 Q. B. D. 314 (1876). Piece of zinc falling from roof of building on person on the street. See Khron v. Brook, 144 Mass. 516 (1887). Or other material. Dohm v. Dawson, 84 Hun, 110 (1895); 32 N. Y. Supp. 59; 90 Hun, 271 (1895); 35 N. Y. Supp. 984. Falling of a brick from an overhead bridge on person below on highway. Kearney v. London & C. Ry. Co., L. R., 6 Q. B. 759 (1871), affirming 5 id. 411 (1870). Cockburn, C. J. "Where it is the duty of persons to do their best to keep premises, or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and in the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen." Id. 415. Barrel of flour fell into the street, injuring a person on the street. Byrne v. Boadle, 2 H. & C. 722 (1863). See 3 id. 596 (1865). Falling of a sign in a street, the absence of that care may fairly be presumed from the fact that the defect existed from which the accident arose. Morris v. Strobel & C. Co., 81 Hun, 1 (1894); St. Louis & C. Ry. Co. v. Hopkins, 54 Ark. 209 (1891). See Cummings v. National Furnace Co., 60 Wis. 603 (1884). From the falling of a chisel striking plaintiff while walking on a sidewalk. Dixon v. Pluns, 98 Cal. 384 (1893). From the fall of a brick while plaintiff stopped at defendant's door-sill. Murray v. McShane, 52 Md. 217 (1879). Cross-ties falling from a car. Howser v. Cumberland & C. R. R. Co., 80 Md. 146 (1894). From ice and snow falling from roof of a building on one passing in the street. Shepard v. Creamer, 160 Mass. 496 (1894). From a switch-stick that flew from the hands of a conductor while he was using it on top of an electric street

inference of want of due care in conducting the gas.⁹¹ In the following cases it was held that there was no presumption of negligence.⁹²

§ 186. **Other presumptions—Illustrations.**— Presumptions are an important branch of the law of evidence. They are simply

car to free the trolley, injuring one on the sidewalk. *Manning v. West End Street Ry. Co.*, 166 Mass. 230 (1896). From the fall of a bale of hay. *Dehring v. Comstock*, 78 Mich. 153 (1889). From the fall of bricks from a new building. *Sheridan v. Foley*, 29 Vr. 230 (1895). Not from the falling of a building injuring a workman engaged in tearing the building down. *Weideman v. Tacoma Ry. & Co.*, 7 Wash. St. 517 (1893). From the escape of electricity from a street railway injuring a horse, being driven on a public street, is presumptive proof of negligence in the operation of the railway. *Trenton Passenger Ry. Co. v. Cooper*, 31 Vr. 219 (1897). From the blowing of a locomotive whistle loudly and repeatedly under a bridge constantly used by all kinds of vehicles. *Mitchell v. Nashville & C. Ry. Co.*, 100 Tenn. 329 (1897).

⁹¹ *Carmody v. Boston Gas Light Co.*, 162 Mass. 539 (1895). See *Ottersbach v. Philadelphia*, 161 Pa. St. 111 (1894); *Citizens Gas Light & C. Co. v. O'Brien*, 118 Ill. 174 (1886); *Schmeer v. Gas Light Co.*, 147 N. Y. 529 (1895).

⁹² Servant was injured by the explosion of pipes while refining crude oil. *Bahr v. Lombard & Co.*, 24 Vr. 233 (1890). See *Illinois Central R. R. Co. v. Phillips*, 55 Ill. 194 (1870). From defects in approaches to stations, stairways

or station platforms, sleet and snow on the stairway of a station. *Kelly v. Manhattan Ry. Co.*, 112 N. Y. 443 (1889). From fall of a bust in a hall. *Kendall v. City of Boston*, 118 Mass. 234 (1875). Injuries to adjoining property from an explosion on premises adjacent thereto. *Cosulich v. Standard Oil Co.*, 122 N. Y. 118 (1890); *Losee v. Buchanan*, 51 N. Y. 476 (1873), distinguishing *Hay v. Cohoes Co.*, 2 id. 159 (1849). Explosion of dynamite on a car in defendant's yard. *Walker v. Chicago & C. Ry. Co.*, 71 Iowa, 658 (1887). Explosion of a steam boiler injuring an employee. *Huff v. Austin*, 46 Ohio St. 386 (1889); *Oliver v. Whitney Marble Co.*, 103 N. Y. 292 (1886); *Young v. Bransford*, 12 Lea, 232 (1883); *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228 (1896). Collision of steam car with horse car, in which plaintiff was riding, no presumption of negligence against the non-carrying company. *Philadelphia & C. R. R. Co. v. Boyer*, 97 Pa. St. 91 (1881). Bridge giving way by an extraordinary flood. *Livezey v. Philadelphia*, 64 Pa. St. 106 (1870). Plaintiff struck by something in defendant's store. *Huey v. Gahlenbeck*, 110 Pa. St. 238 (1888). Negligence will not be presumed from the mere fact that a horse runs away. *McCauley v. Mayor & C. of New York*, 67 N. Y. 602 (1876).

inferences or deductions made from the facts proven in the case, links in the chain of evidence. In the reports there are many illustrations of this branch of the law of evidence applied by the courts to accident cases.⁹³ When the injury is proved to have been caused by an engine and car while being operated

⁹³ If there is any presumption of law in such matters, it is that all parties act with ordinary care, and such presumption continues until overthrown by evidence. *Spears v. Chicago &c. R. R. Co.*, 43 Neb. 720 (1895). The presumption is, until the contrary is shown, that every man has performed his duty. *Cosulich v. Standard Oil Co.*, 122 N. Y. 118 (1890); *Huff v. Austin*, 46 Ohio St. 386, 387 (1889); *St. Louis &c. Ry. Co. v. Weaver*, 35 Kan. 412, 424 (1886). Of love of life and instinct of self-preservation. *Cleveland &c. R. R. Co. v. Rowan*, 66 Pa. St. 393 (1870). Known disposition of men to avoid injury to themselves. *Northern Central Ry. Co. v. State*, 31 Md. 357 (1869). That a traveller did stop, look and listen upon crossing a railroad track and will prevail in the absence of direct testimony on the subject. *Wynning v. Detroit R. R. Co.*, 64 Mich. 93 (1887); *Chicago &c. Ry. Co. v. Hinds*, 56 Kan. 758 (1896); *Texas &c. R. R. Co. v. Gentry*, 163 U. S. 353 (1896). *Contra*, *Tucker v. New York &c. R. R. Co.*, 124 N. Y. 308 (1891). From the fact that the defendant owned the horses that did the injury it was presumed that those in charge of them were defendant's servants. *Norris v. Kohler*, 41 N. Y. 42 (1869). That truck had defendant's name on it. *Seaman v. Koehler*, 122 N. Y. 646 (1890). There is no presumption that a gas lamp in a city is lighted at night. *Fisher v. Rankin*, 78 Hun, 407 (1894). A cable of an elevator in use three or four years without accident will not justify a presumption that it will continue so. *Goodsell v. Taylor*, 41 Minn. 207 (1889). Starting of horses while a passenger is getting into or out of a coach creates a presumption either that the driver was careless, or the horses not safe and steady. *Roberts v. Johnson*, 58 N. Y. 613 (1874). When a train of cars stops at or about the usual time and place after the announcement of a station, a traveller is justified in presuming it is for the discharge of passengers. *McNulta v. Ensich*, 31 Ill. App. 100 (1888); *Richmond &c. R. R. Co. v. Smith*, 92 Ala. 237 (1890). It is presumptively a negligent act for a passenger to attempt to alight from a moving train. *Burrows v. Erie Ry. Co.*, 63 N. Y. 556 (1876). A person attempting to cross a steam railroad track has a right to presume that the railroad company will give the signals required by law. *Texas &c. R. R. Co. v. Spradling*, 72 Fed. Rep. 152 (1896); 18 C. C. A. 496. Or that a railroad company will obey an ordinance limiting the speed of trains in a city. *Kellny v. Missouri Pac. Ry. Co.*, 101 Mo. 67 (1890). Passengers on boats protected by chains or other guards have a right to assume, when the chain or guard is let down, that it is safe for them to proceed. *Ferris v. Union Ferry Co.*, 36 N. Y. 312 (1867).

on the defendant's track, it is unnecessary to prove the ownership of such engine and car, or that the persons operating them were the servants of the defendant, they are presumed to belong to, and to be employed by, the defendant.⁹⁴

§ 187. Presumption that streets and sidewalks are free from pitfalls.— When persons are injured, while passing on streets or sidewalks, by obstructions or pitfalls illegally placed or made therein, it is to be presumed that such streets and sidewalks are free from obstructions or pitfalls their full width.⁹⁵ A person walking along the sidewalk of a street in a city, not near a crossing, has a right to assume that the place is safe.⁹⁶

§ 188. Evidence of precautions taken after an accident, is not admissible.— Precautions taken subsequent to the alleged negligent act which caused the injury are inadmissible in evidence for the purpose of showing antecedent negligence.⁹⁷ On this point there is a contrariety of decisions and reasoning by the courts, but it now seems to be settled by the weight of authority and the trend of recent decisions of the highest courts of most of the States in which the question has arisen in favor of the rule, that precautions taken subsequent to an accident do not involve an admission that prior precautions were insufficient.⁹⁸ The Supreme Court of Minnesota at first followed the rulings of the Pennsylvania courts, which have held that repairs, after

⁹⁴ *Lake Erie &c. R. R. Co. v. Neg.* (5th ed.), § 60; *Mullen v. St. Carson*, 4 Ind. App. 185 (1891). *John*, 57 N. Y. 567 (1874); *McKune*

⁹⁵ *Durant v. Palmer*, 5 Dutch. v. Santa Clara Valley Mill &c. Co., 110 Cal. 480 (1895).
⁹⁶ *Loehr*, 124 Ind. 79 (1890).

⁹⁷ *Nally v. Hartford Carpet Co.*, 51 Conn. 524, 527 (1884); *Columbia &c. R. R. Co. v. Hawthorne*, 144 U. S. 202 (1891); *Hart v. Lancashire &c. Ry. Co.*, 21 L. T. (N. S.)

261 (1869); *Hager v. Southern Pac. Co.*, 98 Cal. 309 (1893); *Cleveland &c. R. R. Co. v. Doerr*, 41 Ill. App. 530 (1891); *Sievers v. Peters &c. Co.*, 151 Ind. 42 (1898).

⁹⁸ *Ib.*; *Corcoran v. Village of Peekskill*, 108 N. Y. 151 (1888); *Getty v. Town of Hamlin*, 127 id. 636 (1891).

⁹⁶ *Barry v. Terkildsen*, 72 Cal. 254 (1887). He must use such care and circumspection as the circumstances require. *Quimby v. Filter, Vr.* ; 2 Mun. Corp. Cas. 23, n. (1899). When obstructions are placed in streets or sidewalks, it is said, on such a state of facts, the presumption is that the defendant has violated the duty which the law imposes upon him, of using due care to keep his property off the highway. *Shearm. & Redf. on*

an accident, of a structure, the defects of which were the alleged cause of the injury, were evidence tending to show the previous unsafe condition of the thing repaired, provided the repairs or changes were made so soon after the accident, and under such circumstances as to indicate that they were suggested by it, and were done to remedy the defect which caused it.⁹⁹ The question being again presented to the court, Mr. Justice Mitchell, referring to its previous decisions, said: "But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is, on principle, wrong; not for the reason given by some courts, that the acts of the employes, in making such repairs, are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others — the more likely he would be to do so — and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."¹ Mr. Justice Loomis, speaking for the Supreme Court of Errors of Connecticut, said: "We may well adopt the reasoning of the Minnesota court as covering the entire ground in a few words. Courts

⁹⁹ Where a platform was changed. *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315 (1865). Where a railroad track was afterwards moved. *West Chester &c. R. R. Co. v. McElwee*, 67 Pa. St. 311 (1871). Where defendant afterwards put a light at the opening of a cellar. *McKee v. Bidwell*, 74 Pa. St. 218 (1873), followed in *O'Leary v. City of Mankato*, 21 Minn. 65 (1874); *Kelly v. Southern Minnesota Ry. Co.*, 28 id. 98 (1881); *Shaber v. St. Paul &c. Ry. Co.*, id. 103 (1881). To the same effect are the Kansas cases: *St. Louis &c. Ry. Co. v. Weaver*, 35 Kan. 412 (1886); *Atchison &c. R. R. Co. v. McKee*, 37 id. 592 (1887).
¹ *Morse v. Minneapolis &c. Ry. Co.*, 30 Minn. 465, 468 (1883). To the same effect are *Taylor v. City of Austin*, 32 Minn. 247 (1884); *Day v. Akeley Lumber Co.*, 54 Minn. 522 (1893).

that have taken a different view of this question seem to us to have overlooked the changed conditions under which the acts subsequent to the accident have been done. The fact that an accident has happened, and some person has been injured, immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting. If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence which has no business there, not being in existence at the time."²

§ 189. Evidence of precautions taken after an accident, is not admissible—Continued.—The same principle has been adopted in Iowa, although it would seem to be placed upon the narrow ground that such acts, having been done by agents of the defendant, were not binding on the latter, because not contemporaneous with the injury complained of, where it was held that evidence that a sidewalk had been subsequently repaired was not admissible as an admission of negligence at the time of the accident.³ So, after the accident, evidence that the engineer had been discharged by the defendant was not admissible as tending to show that he was incompetent or careless.⁴ But if the jury is permitted to view the premises, it is proper to show that the gates at the crossing were erected subsequent to the accident.⁵ The same rule has been adopted by the Court of Appeals of New York, where it was held incompetent to show

² *Nally v. Hartford Carpet Co.*, 51 Conn. 524, 531 (1884). In this case it was held that evidence of safeguards placed at the place of danger, after the accident, was inadmissible.

³ *Cramer v. City of Burlington*, 45 Iowa, 627 (1877); *Hudson v. Chicago &c. R. R. Co.*, 59 id. 581 (1882); *Beard v. Guild*, 107 id. 476 (1899).

⁴ *Couch v. Watson Coal Co.*, 46 Iowa, 17 (1877).

⁵ *Lederman v. Pennsylvania R. Co.*, 165 Pa. St. 118 (1895). Or if the defendant attempts to show that no similar accidents have happened since the one under investigation, the plaintiff may show that it is due to subsequent improvements. *Tetherow v. St. Joseph &c. R. R. Co.*, 98 Mo. 74 (1888).

that a truss bridge of wood was, a few months after the accident, replaced by a wider one of iron trusses.³ Nor is evidence of floods admissible subsequent to the one which occasioned the injury.⁷

⁶ *Dale v. Delaware &c. R. R. Co.*, 73 N. Y. 468 (1878). It may be an admission that the former bridge was improperly constructed, but not that the defects were attributable to negligence. *Corcoran v. Village of Peekskill*, 108 N. Y. 151 (1888). Same principle, space on a boat afterwards boarded up. *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1 (1874). Scow was towed at less speed after the accident than before. *Baird v. Daly*, 68 N. Y. 547 (1877). Repairs in a derrick. *King v. New York &c. R. R. Co.*, 4 Hun, 769, 776 (1875). New planks placed at a railroad crossing. *Payne v. Troy &c. R. R. Co.*, 9 Hun, 526 (1877); *Harvey v. New York Central &c. R. R. Co.*, 19 id. 556 (1880). Railing placed on a bridge. *Morrill v. Peck*, 24 Hun, 37 (1881). New oilcloth placed upon the stairs. *Henkel v. Murr*, 31 Hun, 28 (1883). Evidence that, since the occurrence, cinders had not fallen to so great an extent as before, admitted. *Searles v. Manhattan Elevated Ry. Co.*, 17 Jones & S. 425 (1883). Evidence of vicious acts of horses, both before and after the accident, admissible. *Kennon v. Gilmer*, 5 Mont. 257 (1884). Discharge of a driver, whose negligence is the alleged cause of the accident, admissible. *Martin v. Fowle*, 59 N. H. 31 (1879), overruled by *Aldrich v. Concord &c. R. R. Co.*, 29 Atl. Rep. 408.

⁷ *Kansas Pac. Ry. Co. v. Miller*, 2 Colo. 442 (1874); *Denver &c. R. R. Co. v. Morton*, 3 Colo. App. 155 (1893). The same principle has been followed in:

Kentucky: *Standard Oil Co. v. Tierney*, 14 L. R. A. 677 (1891).

Indiana: *Terre Haute &c. R. R. Co. v. Clem*, 123 Ind. 15 (1889); *Sievers v. Peters &c. Co.*, 151 id. 42 (1898).

Illinois: *Hodges v. Percival*, 132 Ill. 53 (1890).

Michigan: *Lombar v. East Tawas*, 86 Mich. 14 (1891); *Fulton Iron &c. Works v. Township of Kimball*, 52 id. 146 (1888).

Massachusetts: *Shinners v. Proprietors &c. Canals*, 154 Mass. 168 (1891).

Missouri: *Ely v. St. Louis &c. Ry. Co.*, 77 Mo. 34 (1882).

Texas: *Missouri Pacific Ry. Co. v. Hennessey*, 75 Tex. 155 (1889); *Gulf &c. Ry. Co. v. McGowan*, 73 id. 355 (1889).

Wisconsin: *Lang v. Sanger*, 76 Wis. 71 (1890); *Heucke v. Milwaukee City Ry. Co.*, 69 id. 401 (1887); *Anderson v. Chicago &c. Ry. Co.*, 87 id. 195 (1894); *Elliott on Roads & Streets*, 647. Though it was held competent to show that a railroad company, immediately after the accident, employed an additional switchman. *Harvey v. New York Central, etc., R. R. Co.*, 19 Hun, 556 (1880).

§ 190. Evidence of previous similar accidents — Conflicting decisions.—Evidence of previous similar accidents at the same place is not admissible.⁸ Where the condition of a sidewalk is in issue, it has been held, by a class of cases, that proof of the happening of a prior accident in the same place is competent upon the ground that it tended to show that the walk, tested by actual use, had been demonstrated to be in an unsafe and improper condition, and that such was its condition at the time the accident occurred.⁹ In New Jersey, it was held incompetent for the defendant to show that over ten thousand persons had passed and repassed, without accident, an area opening into a public street, every year since it had been built.¹⁰ In the New Jersey case it is said, the evidence competent to prove or disprove the matter in issue, when an action is brought to recover compensation for injuries sustained by falling into an excavation of this kind, is as to the character of the footway, the situation of the area with reference to it, and the means

⁸ *Hudson v. Chicago &c. R. R. Co.*, 59 Iowa, 581 (1882); *Davis v. Oregon &c. R. R. Co.*, 8 Or. 172 (1879); *Grand Rapids &c. R. R. Co. v. Huntley*, 38 Mich. 537 (1878); *Parker v. Portland &c. Co.*, 69 Me. 173 (1879); *Whitney v. Gross*, 140 Mass. 232 (1885); *Menard v. Boston &c. R. R. Co.*, 150 id. 386 (1890). See 1 *Thomp. on Neg.* 801; *Shearm. & Redf. on Neg.* (5th ed.), § 60b. *Contra*, *Galveston &c. Ry. Co. v. Evanisch*, 63 Tex. 54 (1885); *City of Indianapolis v. Emmelman*, 108 Ind. 530 (1886); *Field v. Davis*, 27 Kan. 400 (1882).

⁹ *Gillrie v. City of Lockport*, 122 N. Y. 403 (1890); *District of Columbia v. Armes*, 107 U. S. 519 (1882); *Quinlan v. City of Utica*, 11 Hun, 217 (1878); *Lombar v. East Tawas*, 86 Mich. 14 (1891); *Hubbell v. City of Yonkers*, 104 N. Y. 434 (1887); id. 459 (1887); *Ester v. City of Seattle*, 18 Wash. St. 304 (1897). To make such evidence competent similar conditions should be

shown. *Ster v. Tuety*, 45 Hun, 49 (1887). Evidence that other sidewalks in the "locality near" were out of repair is inadmissible. *Ruggles v. Town of Nevada*, 63 Iowa, 185 (1884); *City of Bloomington v. Legg*, 151 Ill. 9 (1894).

¹⁰ *Temperance Hall Assn. v. Giles*, 4 Vr. 260 (1869). *Approved* in *Anderson v. Taft*, 39 Atl. Rep. 191; Sup. Ct. R. I., Jan. 13, 1898, where it was held that the highway on which plaintiff was injured had been used in the same condition it was in on the night of the accident for twenty years, without accident, is incompetent on the question of negligence. A number of cases are cited by *Matteson, C. J.*, for and against the admission of such evidence, and the rule which rejects such evidence is said to be founded on the soundest principles. *Approved* in *Moore v. City of Richmond*, 85 Va. 538 (1888); *Blair v. Pelham*, 118 Mass. 420 (1875).

that have been taken to protect such persons as lawfully might use it, from the danger of being accidentally precipitated into it. These are all matters of fact, susceptible of direct proof. It would not be competent for the party suing to prove, as tending to show that it was a nuisance, that at other times other persons fell into the excavation. Nor is it competent for the defendant to introduce evidence that other persons, at other times, when the area was in the same condition, passed the place complained of without receiving any injury. The reason for excluding all evidence of this character is, that it would lead to the trial of a multitude of distinct issues.¹¹ In a case in Minnesota, where the sufficiency or safety of the instrument which is claimed to have caused the accident is in issue, evidence of similar accidents, resulting from the same cause, was held competent. Such facts are, in their nature, experiments to show the actual condition of the instrument.¹² So where the plaintiff's sleigh was upset by striking against a street railroad switch, evidence of other accidents happening at the same place was held admissible.¹³ In Texas the testimony of a witness to the effect, that another child had been hurt on the same evening, that plaintiff was injured, was held admissible, in an action for damages for injuries done to a child, by the failure of a railroad company to secure properly its turntables.¹⁴ In Montana it was held that, in an action to recover damages for injuries occasioned by the upsetting of the defendant's coach, evidence of former accidents, occurring with the same driver, was admissible to prove a bad condition of the road, or a want of familiarity with it, but not to prove his negligence at the time of the accident.¹⁵

¹¹ *Temperance Hall Assn. v. R. Co.*, 83 N. Y. 121 (1880). So *Giles*, 4 Vr. 260, 264 (1869); *Marvin v. City of New Bedford*, 158 Mass. 464 (1893).

¹² *Morse v. Minneapolis & C. Ry. Co.*, 30 Minn. 465 (1883). See *St. Louis & C. Packet Co. v. Keokuk & C. Co.*, 31 Fed. Rep. 755 (1887). So it was held not error to introduce evidence to show that no similar accident had happened for five or six years. *Field v. Davis*, 27 Kan. 400 (1882).

¹³ *Wooley v. Grand Street & C. R.*

R. Co., 83 N. Y. 121 (1880). So evidence was admitted to prove that since the occurrence cinders had not fallen to so great an extent as before. *Searles v. Manhattan Elevated Ry. Co.*, 17 Jones & S. 425 (1883). See *Bower v. Chicago & C. Ry. Co.*, 61 Wis. 457 (1884).

¹⁴ *Galveston & C. Ry. Co. v. Evanisch*, 63 Tex. 54 (1885).

¹⁵ *Higley v. Gilmer*, 3 Mont. 90 (1878). Not competent to show that others had passed over the

§ 191. Is admissible against municipal corporations to prove notice.— In actions against municipal corporations, for injuries caused by defects in highways, it has been held in many cases that evidence of previous accidents occurring at the same place is competent, as showing that the municipal authorities had notice of its dangerous condition.¹⁶ So where a dangerous place has been made in a street by a third person, and left unguarded by the municipality, evidence as to the condition of the street and the absence of lights prior to the accident, is admissible, as tending to show knowledge of the danger and defect on the part of the municipality.¹⁷

§ 192. Former safety of a structure, appliance or machine.— There is a class of cases which hold that it is competent to show that no previous accident has resulted in actual practice from the use of the particular structure, appliance or machine.¹⁸

sidewalk without injury. *Bauer v. City of Indianapolis*, 99 Ind. 56 (1884). Or the absence of casualties on other railroads. *Louisville &c. R. R. Co. v. Commonwealth*, 80 Ky. 143 (1882). Nor to show other defects at other places in a railroad. *Morse v. Minneapolis &c. Ry. Co.*, 30 Minn. 465 (1883). *Contra*, for the purpose of showing that the company did not take due care of its road. *Texas &c. Ry. Co. v. De Milley*, 60 Tex. 194 (1883); *Mobile &c. R. R. Co. v. Ashcraft*, 48 Ala. 15 (1872). Nor to show that a sidewalk was visibly out of repair in the "locality" near where the accident occurred. *Ruggles v. Town of Nevada*, 63 Iowa, 185 (1884). Testimony as to the condition of the street at places other than the place of the accident is inadmissible, but testimony showing the condition of the track at and near the place of the accident within a year is admissible. *Cunningham v. Fair Haven &c. R. R. Co.*, Conn. ; 43 Atl. Rep. 1047 (1899).

¹⁶ *Burrows v. Village of Lake*

Crystal, 61 Minn. 357 (1895); *District of Columbia v. Armes*, 107 U. S. 519 (1882); *City of Bloomington v. Legg*, 151 Ill. 9 (1894); *Alberts v. Village of Vernon*, 96 Mich. 549 (1893); *Golden v. City of Clinton*, 54 Mo. App. 100 (1893); *City of Goshen v. England*, 119 Ind. 368 (1889); *Smith v. City of Des Moines*, 84 Iowa, 685 (1892); *Ester v. City of Seattle*, 18 Wash. St. 304 (1897); *Elliott on Roads & Streets*, 646.

¹⁷ *Pettingill v. City of Yonkers*, 116 N. Y. 558 (1889).

¹⁸ From a float-bridge used to land passengers from a ferry-boat. *Loftus v. Union Ferrying Co.*, 84 N. Y. 455 (1881). An attachment to a bridge *Birmingham v. Rome &c. R. R. Co.*, 137 N. Y. 13 (1893). A supporting hook of a car descending in a mine. *Burke v. Witherbee*, 98 N. Y. 562 (1885). Platform of a station. *Laffin v. Buffalo &c. R. R. Co.*, 106 N. Y. 136 (1887); *Brady v. Manhattan Ry. Co.*, 127 id. 46 (1891); *Missouri Pacific Ry. Co. v. Neiswanger*, 41 Kan. 621 (1889).

Experimental tests, made after an accident, upon a boiler similar in construction to the one in question, are admissible in evidence for the purpose of showing that the defendant was not negligent in the inspection of the boiler which exploded.¹⁹ Evidence was admitted to show that since the occurrence cinders from a locomotive on an elevated railroad had not fallen to so great an extent as before.²⁰ Judge Ray, in his book on Negligence of Imposed Duties,²¹ says the decisions may, perhaps, all be harmonized by the rule that experiments as to matters within the range of ordinary knowledge or experience will be admitted while others will be excluded. Experiments, to be admissible, must be based on conditions similar to those existing in the case on trial.²²

§ 193. A custom cannot justify or prove negligence.—A custom or usage cannot be invoked to justify a negligent act;²³ hence evidence offered for that purpose is inadmissible. Such evidence would be, in effect, an excusing of defendant's negligence, by showing a custom to be equally negligent.²⁴ Nor

¹⁹ *Bradley v. Hartford Steam Boiler &c. Co.*, 19 Fed. Rep. 246 (1883).

²⁰ *Searles v. Manhattan Elevated Ry. Co.*, 17 Jones & S. 425 (1883).

²¹ § 189b.

²² *Leonard v. Southern Pacific R. Co.*, 21 Or. 555 (1892). Experiment of a witness in placing his foot between the rails; must use the shoe worn by the deceased. *Brooke v. Chicago &c. Ry. Co.*, 81 Iowa, 504 (1890). Jury not allowed to witness experiments with cars outside of the courtroom. *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1 (1884). Or to allow the jury to witness the running of machinery in their presence for the purpose of showing that the injury could not have occurred as alleged. *Kinney v. Folkerts*, 84 Mich. 616 (1891).

²³ *Central R. R. Co. v. De Bray*,

71 Ga. 406 (1883); *Wright v. Baller*, 42 Hun, 77 (1886); *Chicago &c. Ry. Co. v. Carpenter*, 12 U. S. App. 392 (1893); *Eppendorf v. Brooklyn City &c. R. R. Co.*, 69 N. Y. 195 (1877); *Lawrence v. Hudson*, 12 Heisk. 671 (1874); *Mason v. Missouri Pacific Ry. Co.*, 27 Kan. 83 (1882); *Citizens Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69 (1897); *Crocker v. Schureman*, 7 Mo. App. 358 (1879); *Temperance Hall Assn. v. Giles*, 4 Vr. 260 (1869). No usage or custom will justify an encroachment on a public highway, or the presence therein of an obstruction which renders it unsafe for the uses to which it is dedicated. *McNerney v. Reading City*, 150 Pa. St. 611 (1892).

²⁴ *Cleveland v. New Jersey Steamboat Co.*, 5 Hun, 523 (1875). See *Jochem v. Robinson*, 72 Wis. 199 (1888).

can the proof of a custom be adduced to show negligence,²⁵ as in the case of a child playing on a railroad company's turntable, the custom of other companies to keep their turntables locked does not make the first company negligent.²⁶ At a known place of danger the absence of the usual and customary precautions may be shown as bearing upon the issue of negligence. Thus, where a collision occurred at a street crossing, evidence that a flagman had always been kept at the crossing, and that he was absent at the time of the accident, is competent.²⁷ So the usual and ordinary distance of erecting tell-tales from the bridge;²⁸ so that it was the custom and usage of defendants' train to carry passengers and the usual stopping place of freight trains at the station.²⁹ In Iowa, evidence was held admissible that it was an order and custom of a railroad company to block all frogs for the purpose of showing that the company conceded that unblocked frogs were dangerous.³⁰ In Illinois, it was held error to refuse an inquiry to be made as to the custom in the yard of a railroad company concerning the running in of cars.³¹ A custom which cannot be invoked to justify

²⁵ *Gulf &c. Ry. Co. v. Evanisch*, 61 Tex. 3 (1884).

²⁶ *Gulf &c. Ry. Co. v. Evanisch*, 61 Tex. 3 (1884). Not admissible to show the customary speed of trains. *Cleveland &c. R. R. Co. v. Newell*, 75 Ind. 542 (1881). Or that people were accustomed to walk on a trestle, or that the deceased was accustomed to jump on trains to show contributory negligence. *Peoria &c. Ry. Co. v. Clayberg*, 107 Ill. 644 (1883). Or that other lumber dealers were accustomed to pile lumber in the same manner. *Earl v. Crouch*, 16 N. Y. Supp. 770 (1891).

²⁷ *McGrath v. New York &c. R. R. Co.*, 63 N. Y. 522 (1876), *distinguishing* *McGrath v. New York &c. R. R. Co.*, 59 id. 468 (1875), which *reversed* 1 Hun, 437; 3 Thomp. & C. 776; see *Casey v. New York &c. R. R. Co.*, 78 N. Y. 518 (1879); *Pittsburgh &c. Ry. Co. v. Yundt*, 78 Ind. 373 (1881).

²⁸ *Wallace v. Central Vt. R. R. Co.*, 138 N. Y. 302 (1893).

²⁹ *McGee v. Missouri Pacific Ry. Co.*, 92 Mo. 208 (1887); *Schultz v. Chicago &c. Ry. Co.*, 44 Wis. 638 (1878). If the rules of the company require trains to be run slowly on certain parts of the track, and these rules have usually been complied with, the public have a right to conclude that they will be observed. *International &c. Ry. Co. v. Gray*, 65 Tex. 32 (1885). See *Sutherland v. Troy &c. R. R. Co.*, 74 Hun, 162 (1893).

³⁰ *Coates v. Burlington &c. Ry. Co.*, 62 Iowa, 486 (1883).

³¹ *Pennsylvania Co. v. Stoelke*, 104 Ill. 201 (1882). It was held competent to show that many persons were accustomed to walk a track or path whereon plaintiff was injured for the purpose of showing a license. *Townley v. Chicago &c. Ry. Co.*, 53 Wis. 626 (1881); *Cassidy v. Oregon &c. Nav. Co.*, 14

a negligent act or to establish a liability, is that custom which is defined as a rule of conduct which a given class of persons observe spontaneously or by tacit consent.³² It refers more particularly to a locality; it is not, and cannot be, in any sense a standard or measure of legal duty, and therefore is irrelevant at the trial on an issue of negligence as not possessing any evidential value for that purpose.³³

§ 194. Usual practice — Course of business — Experiments.— The usual practice of others in the same business or employment, under like circumstances, may be shown to indicate whether ordinary care was used in a special instance;³⁴ as for example, when the act of the plaintiff was not negligence *per se*, it is competent to show that persons experienced in the performance of the same act, under similar circumstances, performed it as he did.³⁵ What persons customarily do under similar circumstances has no application, as a test of ordinary care, when the act is so obviously dangerous as to constitute negligence, as a matter of law.³⁶ But when the sufficiency of the appliance or machinery or the adequacy of the method employed in doing a particular thing can be determined only by experiment, there is a class of cases which hold that it may be shown in evidence,

Or. 551 (1887); *Eckert v. St. Louis &c. Ry. Co.*, 13 Mo. App. 352 (1883); *Western &c. R. R. Co. v. Meigs*, 74 Ga. 857 (1885). The custom of employes, or danger attending a certain course of action, admissible to show contributory negligence. *McKean v. Burlington &c. R. R. Co.*, 55 Iowa, 192 (1880).

³² *Rapl. & L. L. Dict.* (vol. 1), p. 331. A rule of law cannot be changed by any local custom. *Wright v. Boller*, 42 Hun, 77 (1886).

³³ Evidence that it was usual for towns in that county to leave drains uncovered is inadmissible. *Hinckley v. Inhabitants of Barnstable*, 109 Mass. 126 (1872).

³⁴ *Maynard v. Buck*, 100 Mass. 40 (1868); *Kolsti v. Minneapolis*

&c. Ry. Co., 32 Minn. 133 (1884); *Cass v. Boston &c. R. R. Co.*, 14 Allen, 448 (1867); *Holly v. Boston Gas Light Co.*, 8 Gray, 123 (1857); *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557 (1852); *Belleville Stone Co. v. Comben*, 32 Vr. 353 (1898). See *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454 (1875); *Chicago &c. Ry. Co. v. Clark*, 108 Ill. 113 (1883); *Chicago &c. Ry. Co. v. Carpenter*, 12 U. S. App. 392 (1893); *Jochem v. Robinson*, 72 Wis. 199 (1888).

³⁵ *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372 (1895). See *Lawson on Usages & Customs*, p. 318; 27 *Am. & Eng. Ency. of Law* (1st ed.), p. 902.

³⁶ *Douglass v. Chicago &c. Ry. Co.*, 100 Wis. 405 (1898).

that the act from which the injury resulted was done in the usual and customary way. Thus the plaintiff may show that the uncoupling of cars, while in motion, was unusual.³⁷ So it is competent for the defendant to introduce evidence of the mode generally adopted by prudent railroad men in switching their cars under like circumstances.³⁸ It is competent to prove that the fastenings to the guard of a railroad turntable were similar in character to those in general use on such turntables.³⁹ So, the failure to adopt a known and uniform usage among travellers, in the management of loaded teams upon a steep part of a highway, is competent evidence of negligence.⁴⁰

§ 195. **Admissions and declarations—In general.**—Admissions and declarations are admissible in evidence, either because they are supposed to have been made against the party's interest, and are, therefore, probably true, or because they are so intimately connected and interwoven with the principal event, as to constitute a part of the *res gestae*. This is an exception to the general rule of hearsay evidence. Professor Greenleaf says they are more properly admissible as a *substitute* for the ordinary and legal proof, or on the grounds of public policy and convenience.⁴¹ It is not within the scope or purpose of this book to treat at length this general principle in the law of evidence, which will be found in those standard works on the law of evidence;⁴² but to present those cases in which the courts have applied the principle to accident cases; first, admissions and declarations made by the plaintiff against interest. A declaration made by the deceased immediately after the accident, that he had jumped from the car, is admissible as an admission against interest;⁴³ or of the cause of the injury;⁴⁴ or, by the plaintiff,

³⁷ Jeffrey v. Keokuk &c. Ry. Co., 56 Iowa, 546 (1881).

³⁸ By experts. Houston &c. Ry. Co. v. Cowser, 57 Tex. 293 (1882).

³⁹ Kolsti v. Minneapolis &c. Ry. Co., 32 Minn. 133 (1884); Kelly v. Southern Minnesota Ry. Co., 28 id. 98 (1881).

⁴⁰ Aldrick v. Monroe, 60 N. H. 118 (1880). Evidence of the customary speed at which locomotives of the defendant ran as bear-

ing on the speed at the time of the accident. Shaber v. St. Paul &c. Ry. Co., 28 Minn. 103 (1881).

⁴¹ Greenl. on Ev., § 169; 1 Phill. on Ev., chap. 5, § 4. See Shearm. & Redf. on Neg. (5th ed.), § 60a.

⁴² Greenl. on Ev., § 169; 1 Phill. on Ev., chap 5, § 4.

⁴³ Stein v. Grand Ave. Ry. Co., 10 Phila. 440 (1875).

⁴⁴ Entwistle v. Feighner, 60 Mo. 214 (1875); Perigo v. Chicago

of the nature and extent of the injury;⁴⁵ but the declarations of a person injured, made to his physician, as to the cause of such injury, was held inadmissible.⁴⁶ Admissions and declarations made by the defendant against his interest are admissible in evidence against himself,⁴⁷ on the same principle that admissions of the plaintiff are received. But the admissions of one defendant in tort are not admissible against his co-defendant.⁴⁸ An admission of having caused the accident or casualty is not, necessarily, an admission of having been in fault.⁴⁹ An assignment by the defendant of all his property on the day after the accident, without any proof of consideration, except the recitals in the assignment, is evidence that the defendant was *conscious* of liability, and is admissible, the weight of which is to be determined by the jury.⁵⁰

§ 196. Admissions and declarations by agents — Husbands and wives.— Admissions and declarations by officers of a corporation rest upon the same principle as apply to other agents.⁵¹ Thus, if the agent of a railroad company be in the performance of a duty of the company, and while performing that duty, what he says as to any defect in the structure of the road is

&c. R. R. Co., 55 Iowa, 326 (1880);
Stowe v. Bishop, 58 Vt. 498 (1886);
Zemp v. Wilmington &c. R. R. Co.,
9 Rich. L. 84 (1855).

⁴⁵ Gardner v. Bennett, 6 Jones &
S. 197 (1874). See Firkins v. Chi-
cago &c. Ry. Co., 61 Minn. 31
(1895).

⁴⁶ Illinois Central R. R. Co. v.
Sutton, 42 Ill. 438 (1867).

⁴⁷ De Benedetti v. Mauchin, 1
Hilt. 213 (1856).

⁴⁸ De Benedetti v. Mauchin, 1
Hilt. 213 (1856); 1 Phill. on Ev.,
chap. 5, § 4, p. 93.

⁴⁹ Lansing v. Stone, 37 Barb. 15,
20 (1862); 14 Abb. Pr. 199. Al-
though an admission of liability is
evidence of the fact of negligence,
it does not in itself create liability
apart from the facts. Swift Elec-
tric Light Co. v. Grant, 90 Mich.
469 (1892).

⁵⁰ Banfield v. Whipple, 10 Allen,
27 (1865).

⁵¹ Pennsylvania R. R. Co. v.
Books, 57 Pa. St. 339 (1868). See
Alabama &c. R. R. Co. v. Hawk,
72 Ala. 112 (1882). Statements of
the general manager of a railroad.
Krogg v. Atlanta &c. R. R. Co., 77
Ga. 202 (1886). Declarations of a
lineman of a natural gas company.
Baker v. Westmoreland Gas Co.,
157 Pa. St. 593 (1893). Declara-
tions and admissions of a public
officer are inadmissible to bind a
municipal corporation of which he
is the agent unless they are part
of the *res gestae*. Cortland County
v. Herkimer County, 44 N. Y. 22
(1870). Nor his acts subsequent to
the event in controversy. Clapper
v. Town of Waterford, 131 N. Y.
382 (1892).

res gestae as to such defect, and his admissions are the admissions of the corporation;⁵² or a declaration made by a motor-man, of an electric car, while the car was still on the body of one whom he had run down, that the reason he did not stop was that he could not reverse the car, is admissible in evidence as part of the *res gestae* in a suit for the injury.⁵³ Admissions made by a husband against his wife,⁵⁴ or admissions made by a wife, in an action by her husband for an injury, that the defendant was free from negligence, are not competent evidence.⁵⁵

§ 197. Declarations as part of the *res gestae* — The rule stated.

— The rule to test the admissibility of declarations, on the ground that they are part of the *res gestae*, was stated by Mr. Justice Fletcher, of the Supreme Judicial Court of the State of Massachusetts, thus: “It is a well-established principle of the law that declarations which form a part of the *res gestae*, and are to be considered as a part of the transaction, do not come under the head of hearsay, but are admissible as original evidence. This is a settled general rule, but, like other general rules, its application to particular cases is often attended with much doubt and difficulty; but it is wholly impracticable to bring this class of cases within the limits of any clearly-defined and positive rules. There are, however, certain principles and tests, which are simple and intelligible, by which the admission of this kind of evidence must be determined. * * * When the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declara-

⁵² Krogg v. Atlanta &c. R. R. Co., 34 N. Y. 29 (1865). In an action by a widow as administratrix such declarations are admissible for the purpose of contradicting her testimony at the trial, but not for the purpose of proving negligence of the deceased.

⁵³ Springfield Consolidated Ry. Co. v. Welsch, 155 Ill. 511 (1895).

⁵⁴ Keller v. Sioux City &c. R. R. Co., 27 Minn. 178 (1880); Louisville &c. R. R. Co. v. Richardson, 66 Ind. 43 (1879).

⁵⁵ Stillwell v. New York &c. R. R. Co., 52 Wis. 354 (1881).

tions, as a part of the transaction, to explain the particular fact, distinguish this class of declarations from mere hearsay. Such a declaration derives credit and importance as forming a part of the transaction itself and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it. * * * In general, the *res gestae* mean those declarations and those surrounding facts and circumstances which grow out of the main transaction. The main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction * * * to be admissible, they must be contemporaneous with the main fact or transaction; but it is impracticable to fix, by any general rule, any exact instant of time, so as to preclude debate and conflict of opinion in regard to this particular point."⁵⁶

§ 198. Declarations as part of the *res gestae* — Continued — In statutory actions for causing death.— Proximity in time with the act causing the injury is essential to make what was said by a third person competent evidence as part of the *res gestae* :

⁵⁶ *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36, 41, 42 (1851). Cited with approval by Earl, J., of the New York Court of Appeals in *Waldele v. New York &c. R. R. Co.*, 95 N. Y. 274, 278 (1884). In the Massachusetts case declarations of a physician, made at the time of his examination of an injury, offered to show the nature and extent of the injury, although the physician be dead at the time for trial, was held inadmissible, not being a part of the *res gestae*. In the New York case an educated deaf-mute was found injured by the side of a railroad track. Declarations made by him by means of signs about thirty minutes after the accident, to the effect that there was a long train; that he waited for it to go by, and was struck by an engine which followed, held, not admissible. Reversing 29 Hun, 35, for admitting such testimony. For other cases and authorities see *Commonwealth v. M'Pike*, 3 Cush. 181 (1849); *Travellers Ins. Co. v. Mosley*, 8 Wall. 397 (1869); *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396 (1867); 1 Greenl. on Ev., § 108; 1 Stark. on Ev., § 28; 1 Phill. on Ev. (5th Am. ed.), p. 231; *Baltimore &c. R. R. Co. v. Chambers*, 81 Md. 371 (1895); *Elliott on Roads & Streets*, 644.

that alone is insufficient; it must be part of the principal fact and so part of the act itself, that is, naturally accompanying the act or calculated to unfold its character and quality.⁵⁷ Declarations which are merely narrative of a past transaction are not admissible as part of the *res gestae*,⁵⁸ they must stand in immediate casual relation to the act.⁵⁹ The reported cases illustrate the difficulty of applying this principle in the law of evidence to accident cases correctly. It is one thing to define a principle of law with precision and quite a different matter to apply it well. In the following cases declarations were held admissible as part of the *res gestae*. A declaration of the deceased as to the cause of the injury, made at the time and place of the occurrence;⁶⁰ so words spoken by a driver in his effort to control a runaway horse are admissible in evidence as part of the *res gestae*, on the trial of an action for damages for injuries resulting from the frightening of the horse.⁶¹ Such admissions and declarations, when admitted by the court, should be considered by the jury in connection with all the circumstances under which they were made;⁶² they are not conclusive.⁶³ In actions brought under the statute for causing the death of a human being, declarations of the deceased, if not admissible as part of the *res gestae*, are not admissible in favor of the defendant as admissions, since the plaintiff in such case does

⁵⁷ *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417 (1894). An exclamation of pain made immediately after the blow to which the guard made an insulting reply, such reply was held inadmissible, not being a part of the *res gestae*. *Alabama &c. R. R. Co. v. Hawk*, 72 Ala. 112 (1882).

⁵⁸ *Waldele v. New York &c. R. R. Co.*, 95 N. Y. 274 (1884); *Rockwell v. Taylor*, 41 Conn. 55 (1874); *Cleveland &c. R. R. Co. v. Mara*, 26 Ohio St. 185 (1875).

⁵⁹ *Whart. on Ev.*, § 259.

⁶⁰ *Stoeckman v. Terre Haute &c. R. R. Co.*, 15 Mo. App. 503 (1884). Where such declarations formed connecting circumstances, al-

though some little time may have intervened. *Harriman v. Stowe*, 57 Mo. 93 (1874); *Entwistle v. Feighner*, 60 id. 214 (1875); *Casey v. New York &c. R. R. Co.*, 78 N. Y. 518 (1879); *Elkins v. McKean*, 79 Pa. St. 493 (1875); *Brownell v. Pacific R. R. Co.*, 47 Mo. 239 (1871); *Whart. on Ev.*, § 263. Intestate immediately after the accident said he had jumped from the car. *Stein v. Grand Ave. Ry. Co.*, 10 Phila. 440 (1875).

⁶¹ *Trenton Pass. Ry. Co. v. Cooper*, 31 Vr. 219 (1897).

⁶² *Perigo v. Chicago &c. R. R. Co.*, 55 Iowa, 326 (1880).

⁶³ *Funston v. Chicago &c. Ry. Co.*, 61 Iowa, 452 (1883).

not claim in the right of the deceased but upon a new cause of action.⁶⁴

§ 199. **Declarations as part of the *res gestae* — Applications of the rule.**—Declarations and admissions of servants, agents or superintendents of the plaintiff or defendant are admissible in favor of either party, if part of the *res gestae*,⁶⁵ or if made at the time of the casualty, while acting within the scope of their agency⁶⁶ for the party against whom they are offered.⁶⁷ The declarations of the conductor a few moments before the collision, stating what precautions, if any, he had taken to guard against danger, were held admissible.⁶⁸

⁶⁴ *Tiffany on Death by Wrongful Act*, § 194; *City of Bradford v. Downs*, 126 Pa. St. 622 (1889); *Pennsylvania Co. v. Long*, 94 Ind. 250 (1883); *Stein v. Railway Co.*, 10 Phila. 440 (1875). *Contra*, *Perigo v. Chicago &c. R. R. Co.*, 55 Iowa, 326 (1880); *Lord v. Pueblo &c. Refining Co.*, 12 Colo. 390 (1880).

⁶⁵ *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396 (1867); *Pennsylvania R. R. Co. v. Books*, 57 id. 339 (1868); *Mullan v. Philadelphia &c. Steamship Co.*, 78 id. 25 (1875); *Ashmore v. Pennsylvania Steam Towing &c. Co.*, 9 Vr. 13 (1875); *Krogg v. Atlanta &c. R. R. Co.*, 77 Ga. 202 (1886).

⁶⁶ *Lafayette &c. R. R. Co. v. Ehman*, 30 Ind. 83 (1868); *Huntington &c. R. R. Co. v. Decker*, 82 Pa. St. 119 (1876); *Darling v. Oswego Falls Mfg. Co.*, 30 Hun, 276 (1883); *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339 (1868).

⁶⁷ *Abb. Tr. Ev.*, p. 588 § 17.

⁶⁸ *Chicago &c. R. R. Co. v. Holland*, 122 Ill. 461 (1887). See *East St. Louis Ry. Co. v. Allen*, 54 Ill. App. 27 (1894). Declarations of a motorman at the time of the injury and made at the time the car was still on the body of one whom it had

run down, are admissible. *Springfield Consolidated Ry. Co. v. Welsch*, 155 Ill. 511 (1895). In the following cases such declarations or admissions held not admissible: Of an engineer a few days after the accident. *Robinson v. Fitchburg &c. R. R. Co.*, 7 Gray, 92 (1856); *Huntington &c. R. R. Co. v. Decker*, 82 Pa. St. 119 (1876); *Michigan Central R. R. Co. v. Gougar*, 55 Ill. 503 (1870). Statements by conductor to fireman, at the next station, after the accident. *Central R. R. Co. v. Kelly*, 58 Ga. 107 (1877). Statement by flagman as to how far he had gone back to flag a coming train. *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339 (1868). Of a servant of a railroad company, while returning on the train with the body of the deceased. *Tanner v. Louisville &c. R. R. Co.*, 60 Ala. 621 (1877); *Bellefontaine Ry. Co. v. Hunter*, 33 Ind. 335 (1870). Collision between two carriages, defendant's servant said plaintiff was not to blame. *Lane v. Bryant*, 9 Gray, 245 (1857). Statement made by engineer and printed in a newspaper soon after the accident. *East Tennessee &c. R. R. Co. v. Eanes*,

§ 200. **Dying declarations are not admissible in civil actions.**— Dying declarations are not admissible in civil actions, unless they are part of the *res gestae*.⁶⁹

§ 201. **Expert and opinion evidence—In general.**— The general rule of law is, that witnesses must state facts within their knowledge, and not give their opinions or their inferences. To this rule there are some exceptions, among which is expert evidence. It is not sufficient to warrant the introduction of expert evi-

8 Baxt. 221 (1874). By conductor and engineer a "few minutes" after the accident. Alabama, Great Southern R. R. Co. v. Hawk, 72 Ala. 112 (1882). Made an hour after the accident by an agent. Aldridge v. Midland Blast Furnace Co., 78 Mo. 559 (1883). Of captain, soon after the accident, that place was dangerous. American Steamship Co. v. Landreth, 102 Pa. St. 131 (1883). Declarations of the driver, to the owner of the carriage and team, after his return to the stable without the injured person. Prideaux v. City of Mineral Point, 43 Wis. 513 (1878). An employe who was injured, and while he was being taken out from under the car by which he had been injured, and while he was being conveyed to the switch-house, said: "I pulled the pin and made a grab for the car, and there was nothing there for me to grab," held, such declaration inadmissible. Martin v. New York &c. R. R. Co., 103 N. Y. 626 (1886). Declarations made twenty minutes after a collision between a locomotive and a buggy. Roach v. Western &c. R. R. Co., 93 Ga. 785 (1894). Admissions by father of the person injured. Taylor v. Grand Trunk Ry. Co., 48 N. H. 304 (1869). One in charge of an elevator said: "He lost all control, and the connection cord got broke." Lissak v. Croker Estate Co., 119 Cal. 442 (1897). Declarations, either of the wife or of the deceased himself, made one or two days after the accident, as to the manner in which it occurred, are not admissible for the defense as part of the *res gestae*. Fitzgerald v. Town of Weston, 52 Wis. 354 (1881). Person falling into a ditch when in the act of landing from a car, what he said immediately afterwards, and while being helped out of the ditch, as to the cause of the accident, is a mere account of a past transaction. Cleveland &c. R. R. Co. v. Mara, 26 Ohio St. 185 (1875). Statements made by the deceased after he was removed to a hotel. Chicago &c. Ry. Co. v. Howard, 6 Ill. App. 569 (1880); Marshall v. Chicago &c. Ry. Co., 48 Ill. 475 (1868).
⁶⁹ Waldele v. New York &c. R. R. Co., 95 N. Y. 287 (1884); Chicago &c. Ry. Co. v. Howard, 6 Ill. App. 569 (1880); Marshall v. Chicago &c. Ry. Co., 48 Ill. 475 (1868); Brownell v. Pacific R. R. Co., 47 Mo. 239 (1871); Spatz v. Lyons, 55 Barb. 476 (1870); East Tennessee &c. R. R. Co. v. Maloy, 77 Ga. 237 (1886); Greenl. on Ev., § 156; Phill. on Ev. (5th Am. ed.), p. 236.

dence that the witness may know more of the subject of inquiry and may better comprehend and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science or art, in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have.⁷⁰ Scientific opinions can only be founded on established facts.⁷¹ The testimony of experts is to be considered like other testimony, it is to be tried by the same tests, it is to secure as much weight and credit as the jury may deem it entitled to, when viewed in connection with all the other circumstances. Its weight and value are questions for the jury and not for the court.⁷² The interest of an expert affects the weight and not the legality of his testimony.⁷³ The line which divides a fact from an opinion cannot always be very clearly defined.⁷⁴ Earl, J., speaking for the New York Court of Appeals, says: "We think it should not be much encouraged and should be received only in cases of necessity."⁷⁵

§ 202. Who are experts — Illustrative cases.—A witness called to testify as an expert concerning an occupation, trade,

⁷⁰ *Ferguson v. Hubbell*, 97 N. Y. 507, 512 (1884); *Pennsylvania Co. v. Conlan*, 101 Ill. 93 (1881); *Lester v. Town of Pittsfield*, 7 Vt. 158 (1835); *Muldowney v. Illinois Central Ry. Co.*, 36 Iowa, 462 (1873); 1 *Greenl. on Ev.*, § 440; *Elliot on Roads & Streets*, p. 650; 12 *Am. & Eng. Ency. of Law* (2d ed.), p. 418.

⁷¹ *Grand Rapids &c. R. R. Co. v. Huntley*, 38 Mich. 537 (1878).

⁷² *Atchison &c. R. R. Co. v. Thul*, 32 Kan. 255 (1884); *Sanders v. State*, 94 Ind. 147 (1883); *Sioux City &c. R. R. Co. v. Finlayson*, 16 Neb. 578 (1884).

⁷³ *New Jersey Zinc &c. Co. v. Lehigh Zinc &c. Co.*, 30 Vr. 189 (1896).

⁷⁴ *Yahn v. City of Ottumwa*, 60 Iowa, 429 (1883).

⁷⁵ *Ferguson v. Hubbell*, 97 N. Y. 507, 514 (1884). Mr. Justice Peckham, of the New York Court of Appeals, now a justice of the Supreme Court of the United States, speaking of this subject, said: "Expert evidence, so called, or, in other words, evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of opinion desired by any party to the investigation can be readily procured by paying the market price therefor." *Roberts v. New York Elevated R. R. Co.*, 128 N. Y. 455, 464 (1891).

profession, science or art, requiring a particular kind of knowledge, skill or experience must, to be competent, show himself to be possessed of such knowledge, skill or experience.⁷⁶ For that purpose it is the general practice of trial courts to permit the opposite counsel to first examine the witness at length, to show his qualification to testify concerning the subject-matter for which he was called. It is difficult, if not impossible, to lay down any rule, applicable to all cases, as to what is or is not expert testimony,⁷⁷ or who is entitled to be considered an expert in regard to any matter of science or skill; it cannot be determined by any precise rule; it is a question which must be left very much to the discretion of the trial judge, and his decision is conclusive unless clearly shown to be erroneous in matter of law.⁷⁸ An electrical engineer and a mechanical engineer, who had experience in putting up electric lights of the kind in question, are competent witnesses, as experts, to describe the imperfections in the appliances by which an electric light lamp was suspended over a street.⁷⁹ A carpenter and joiner, who had been connected with a street railway for four years, and had made turntables for it, is competent to testify as an expert, whether a certain turntable was safe or was the most approved turntable in general use.⁸⁰ A witness, who has been employed in railroad work twenty-five years, part of the time in charge of a turntable, is competent to answer the question, "Would it be practicable to lock or frame turntables?"⁸¹ One practiced in building locomotives and in running them on trial trips is competent as an expert to testify as to the distance

⁷⁶ *Hinds v. Harbou*, 58 Ind. 121 (1877); *Chicago &c. R. R. Co. v. Springfield &c. R. R. Co.*, 67 Ill. 142 (1873).

⁷⁷ *Funston v. Chicago &c. Ry. Co.*, 61 Iowa, 452 (1883). A person may be qualified to testify as an expert, either by study without practice or practice without study, but not by mere observation, without either study or practice. *Wheeler &c. Co. v. Buckhout*, 31 Vr. 102 (1897); *Laws. on Ex. & Sp. Ev.* p. 210.

⁷⁸ *New Jersey Zinc &c. Co. v. Lehigh Zinc &c. Co.*, 30 Vr. 189 (1896); *Stillwell &c. Mfg. Co. v. Phelps*, 130 U. S. 520 (1888); *Rogers on Exp. Test.*, § 22; *Perkins v. Stickney*, 132 Mass. 217 (1882); *Commonwealth v. Sturtivant*, 117 id. 122 (1875).

⁷⁹ *Excelsior Electric Co. v. Sweet*, 28 Vr. 224 (1894).

⁸⁰ *Fitts v. Cream City R. R. Co.*, 59 Wis. 323 (1884).

⁸¹ *Kolsti v. Minneapolis &c. Ry. Co.*, 32 Minn. 133 (1884).

within which a train of cars may be stopped by a steam brake.⁸² An engineer who has planned and superintended the building of bridges may testify as to the probable cost of a bridge, though he has had no experience as a practical bridge builder; and this, though he has obtained the prices of the materials from persons dealing therein.⁸³ So, one who is conversant with, and has had peculiar opportunities for observing cotton may express his opinion that it will burn with such rapidity that its extinguishment would be impossible.⁸⁴ A practical miner, who has used blasting powder for years, and also large amounts of other powder, may be asked his opinion, based upon his experience, as to the safety of that powder.⁸⁵ Persons engaged about the business of transportation, such as railroad brakemen, and experienced in railroad matters, may express opinions in matters involved within their line of experience.⁸⁶

§ 203. **Who are not experts.**—An experience of six months as agent for a life insurance company will not qualify a witness to testify as an expert as to the probabilities of life at a certain age.⁸⁷ Brakemen, baggage-masters or conductors are not competent to give their opinion as experts respecting the coupling of cars or the danger a brakeman would incur by attempting to make a coupling under certain circumstances.⁸⁸

§ 204. **What is the subject of expert testimony — Injuries.**—Whether a railroad structure is such as to warrant fast travel

⁸² *Eckert v. St. Louis &c. Ry.* may be shown by a witness Co., 13 Mo. App. 352 (1883). See *skilled in the business of railroad-Bellefontaine &c. R. R. Co. v. ing. Cincinnati &c. R. R. Co. v. Bailey*, 11 Ohio St. 333 (1860); *Smith*, 22 Ohio St. 227, 246 (1871). *Meagher v. Cooperstown &c. R. R.* ⁸³ *Bryan v. Town of Branford*, Co., 75 Hun, 455 (1894); *Whart.* 50 Conn. 246 (1882).
⁸⁴ *Seals v. Edmondson*, 71 Ala. 509 (1882).
⁸⁵ *Sowden v. Idaho Quartz Mining Co.*, 55 Cal. 443 (1880).
⁸⁶ *Fort Worth &c. Ry. Co. v. Thompson*, 75 Tex. 501 (1889).
⁸⁷ *Donaldson v. Mississippi, &c. R. R. Co.*, 18 Iowa, 280 (1865).
⁸⁸ *Muldorney v. Illinois Central Ry. Co.*, 36 Iowa, 462 (1873).

on Ev., § 444. But a person not connected with the management of a train of cars and without experience in the running and management of trains, is not competent to answer the question "How long does it take to stop a train?" *Manhattan &c. Ry. Co. v. Stewart*, 30 Kan. 226 (1883). What is a proper and what an improper place for the brakeman on a train

is not usually a question for ordinary witnesses.⁸⁹ What is and what is not a proper place for a brakeman on a train of cars may be shown by a witness, skilled in the business of railroading.⁹⁰ A locomotive engineer, who is shown to be acquainted with the business of running a locomotive, is competent to testify as an expert upon questions in respect to the management, control and running of trains.⁹¹ A witness, shown to be an expert, may testify whether the turntable in question was one of the most approved turntables, as to defects therein and how they could be remedied;⁹² or where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in a position to make the final decision of the facts.⁹³ Evidence of medical experts, having knowledge of the case, as to the probability of a continuance of the injuries or of a recovery therefrom, is competent;⁹⁴ or that an injury received was the cause of the condition of the person injured, and that certain consequences in relation to his physical health and condition would follow as the result of the injury, as

⁸⁹ Grand Rapids &c. R. R. Co. v. Huntley, 38 Mich. 537 (1878).

⁹⁰ Cincinnati &c. R. R. Co. v. Smith, 22 Ohio St. 227 (1871).

⁹¹ Bellefontaine &c. R. R. Co. v. Bailey, 11 Ohio St. 333 (1860); Augusta &c. R. R. Co. v. Darsey, 68 Ga. 228 (1881); Eckert v. St. Louis &c. Ry. Co., 13 Mo. App. 352 (1883).

⁹² Fitts v. Cream City R. R. Co., 59 Wis. 323 (1884). So whether a blast could throw pieces of rock to a certain distance, being the distance at which the damage was done. Koster v. Noonan, 8 Daly, 231 (1879).

⁹³ Whitaker v. Campbell, 187 Pa. St. 113, 117 (1898). An opinion of the danger of cleaning the machine while the roller was in motion.

⁹⁴ Griswold v. New York &c. R. R. Co., 115 N. Y. 61 (1889); Louisville &c. Ry. Co. v. Falvey, 104 Ind. 409 (1885). Or can say with reasonable certainty what will be the continuance of that condition in the ordinary and natural course of nature. Ayres v. Delaware &c. R. R. Co., 158 N. Y. 254 (1899). He may give an opinion as to the nature and extent of the injury, which is based, in part, on statements made to him by the injured person. Louisville &c. Ry. Co. v. Snyder, 117 Ind. 435 (1888); Cleveland &c. R. R. Co. v. Newell, 104 id. 264 (1885); Consolidated Traction Co. v. Lambertson, 30 Vr. 297 (1896). May give his opinion that plaintiff's injuries are permanent. Coyne v. Manhattan Ry. Co., 42 N. Y. Supp. 617 (1891).

indicated by such condition.⁹⁵ The opinions of medical experts of what might follow or develop, or what was "very likely" to follow or develop, from personal injuries, are merely speculative or contingent as to the consequences and lack the requisite element of reasonable certainty to render them admissible as evidence.⁹⁶

§ 205. **What is not the subject of expert testimony.**— When the facts from which negligence is sought to be inferred are within the experience of all men of common education, the jury must determine the question of negligence without the aid of experts;⁹⁷ thus it is not the subject of expert testimony, whether

⁹⁵ *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459 (1889). Or may give an opinion as to the cause of the injuries. *Donnelly v. St. Paul City Ry. Co.*, 70 Minn. 278 (1897); *Vosburg v. Putney*, 86 Wis. 278 (1893). Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence. *Strohm v. New York &c. R. R. Co.*, 96 N. Y. 305 (1884). Other cases of medical experts. See *Johnson v. Central Vermont R. R. Co.*, 56 Vt. 707 (1884); *Alabama &c. R. R. Co. v. Hill*, 93 Ala. 514 (1890); *Brant v. City of Lyons*, 60 Iowa, 172 (1882); *Grand Rapids &c. R. R. Co. v. Huntley*, 35 Mich. 537 (1878); *Louisville &c. Ry. Co. v. Wood*, 113 Ind. 544 (1887). A physician and surgeon cannot be asked if he would submit to such an operation as he stated would probably make a cure. *Montgomery &c. Ry. Co. v. Mallette*, 92 Ala. 209 (1890). It is proper for a physician to state that his statement of plaintiff's injuries and symptoms, and the absence of external appearances of injury, are "consistent with his medical books." *Blair v. Madison County*, 81 Iowa, 313 (1890). It was held, in Mississippi, that it was not necessary for a physician to be a graduate of a medical college or have a license from a medical board to practice, to render him competent to testify as an expert. *New Orleans &c. R. R. Co. v. Allbritton*, 38 Miss. 242 (1859).

⁹⁶ *Strohm v. New York &c. R. R. Co.*, 96 N. Y. 305 (1884). See *Springfield Consolidated Ry. Co. v. Welsch*, 155 Ill. 511 (1895). Evidence of future consequences which are contingent, speculative and merely possible is too uncertain, as the basis of ascertaining damages. *Turner v. City of Newburgh*, 109 N. Y. 301, 309 (1888).

⁹⁷ *Shafter v. Evans*, 53 Cal. 32 (1878); *New England Glass Co. v. Lovell*, 7 Gray, 319 (1851); *Sioux City &c. R. R. Co. v. Finlayson*, 16 Neb. 578 (1884). Text-books relating to the effect of blindness in horses are inadmissible in evidence; it is not the subject of expert testimony. *Gould v. Schermer*, 101 Iowa, 582 (1897); 1 *Thompson on Neg.* p. 513, § 16; 2 *id.* 799, § 14, note 2. Nor is opinion evidence competent as to the

it is dangerous to leave a kerosene lamp burning in a telegraph office;⁹⁸ or the speed of trains of cars;⁹⁹ or how far one should retire from the track, to be out of danger from a passing train;¹ or that no railroad employe is required to get on and off a train while in motion;² or that a sidewalk is in good repair;³ or whether a two-horse team could be turned in a certain road;⁴ or whether leaving a horse unhitched in a millyard was the act of a careful and prudent man;⁵ or whether a signal was "reasonable or unreasonable," "prudent or extraordinary;"⁶ or that a highway was or was not defective or dangerous where the accident happened;⁷ or the comparative danger of the place where the accident occurred and another place on the road;⁸ nor to state what cause or occasion he saw for the accident;⁹ or whether a railroad crossing was dangerous;¹⁰ or whether the defendant leaving his horse unhitched, under the circumstances, was the act of a careful and prudent man.¹¹ But witnesses

safety of a bridge. *Murray v. Willow*, 43 Wis. 509 (1878); *Barnes Board of County Commissioners, v. Town of Newton*, 46 Iowa, 567 58 Kan. 1 (1897).

⁹⁸ *Wood v. Chicago &c. Ry. Co.*, 51 Wis. 196 (1881).

⁸ *Ivory v. Town of Deer Park*, 116 N. Y. 476, 485 (1889).

⁹⁹ *Grand Rapids &c. R. R. Co. v. Huntley*, 38 Mich. 537 (1878); *Hoppe v. Chicago &c. Ry. Co.*, 61 Wis. 357 (1884); *id.* 325; *Louisville &c. Ry. Co. v. Hendricks*, 128 Ind. 462 (1891).

⁹ *Patterson v. Colebrook*, 29 N. H. 94 (1854).

¹ *Chicago &c. Ry. Co. v. Moranda*, 108 Ill. 576 (1883).

² *Central R. R. Co. v. De Bray*, 71 Ga. 406 (1883).

³ *Kelleher v. City of Keokuk*, 60 Iowa, 473 (1883).

⁴ *Funston v. Chicago &c. Ry. Co.*, 61 Iowa, 452 (1883).

⁵ *Stowe v. Bishop*, 58 Vt. 498 (1886).

⁶ *Hill v. Portland &c. R. R. Co.*, 55 Me. 438 (1867).

⁷ *Lester v. Town of Pittsford*, 7 Vt. 158 (1835); *Ryerson v. Inhabitants of Abington*, 102 Mass. 526 (1869); *Yeaw v. Williams*, 15 R. I. 20 (1885); *Griffin v. Town of*

¹⁰ But should state the facts disclosing the location and surroundings, and leave the jury to determine from the evidence the question of danger. *King v. Missouri Pacific Ry. Co.*, 98 Mo. 235 (1889). In Pennsylvania, in an action to recover damages for injuries sustained by falling into an unguarded areaway, it was held proper to permit a witness who is familiar with the place where the accident occurred, to express the opinion that it was a dangerous place. *McNerney v. Reading City*, 150 Pa. St. 611 (1892). See *Graham v. Pennsylvania Co.*, 139 Pa. St. 149 (1891).

¹¹ *Stowe v. Bishop*, 58 Vt. 498 (1886). Nor whether, in his opinion, the accident would not have

who saw a woman thrown down by the starting of a street car, after she had alighted from it, may give their opinion as to whether she had time to get clear of it.¹² So, a witness, in describing an accident, may state, in connection with the facts, what frightened the horses, from whose sudden starting the injury in question resulted. Such statements are not opinions such as, within the rule, are objectionable.¹³ The plaintiff may testify as to his pain, suffering or internal condition, so far as the same is perceptible to his senses; that does not require scientific skill or knowledge—such evidence is of facts and not of mere opinion.¹⁴ Testimony of witnesses, not experts, must be confined to a statement of the facts and not the giving of opinions.¹⁵ Thus it is not competent for a witness to state that he

happened if, etc. *Crane v. Town of Northfield*, 33 Vt. 124 (1860). An opinion that a stage was not overloaded is inadmissible. *Oleson v. Tolford*, 37 Wis. 327 (1875). Nor can a witness give his opinion as to what he thought about the danger of doing a certain thing. *Sterling Bridge Co. v. Pearl*, 80 Ill. 251 (1875). Error to admit an opinion of non-expert witness as evidence of contributory negligence, based upon a hypothetical case as to the horses, the harness, the wagon and the load. *Beardslee v. Columbia Township*, 188 Pa. St. 496 (1898).

¹² *Ward v. Charleston City Ry. Co.*, 19 So. Car. 521 (1883).

¹³ *Yahn v. City of Ottumwa*, 60 Iowa, 429 (1883).

¹⁴ *Wright v. City of Fort Howard*, 60 Wis. 119 (1884). Expressions of present existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence. They are admitted upon the ground of *necessity* as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not is a question for the

jury. *Cleveland &c. R. R. Co. v. Newell*, 104 Ind. 264, 269 (1885); *Travellers Ins. Co. v. Mosley*, 8 Wall. 397 (1869). A physician may testify that when he first saw the plaintiff she was complaining of pain from an injury she said she had received. *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8 (1890). Or he may testify what the injured person informed him as to the pains suffered and their locality. *Louisville &c. Ry. Co. v. Wood*, 113 Ind. 544 (1887). See *Grand Rapids &c. R. R. Co. v. Huntley*, 38 Mich. 537 (1878).

¹⁵ *Pennsylvania Co. v. Stoelke*, 104 Ill. 201 (1882); *Coates v. Burlington &c. Ry. Co.*, 62 Iowa, 486 (1883); *Michigan Central R. R. Co. v. Gilbert*, 46 Mich. 176 (1881); *Bayley v. Eastern R. R. Co.*, 125 Mass. 62 (1878); *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36 (1851); *Montgomery &c. Ry. Co. v. Mallette*, 92 Ala. 209 (1890). Nor should they be allowed to give their opinions based upon a hypothetical state of facts. *Grant v. Raleigh &c. R. R. Co.*, 108 No. Car. 462 (1891).

used all the means in his power to avoid the accident, but to state what means were used;¹⁶ or that the plaintiff was guilty of negligence in attempting to drive over a defective road;¹⁷ or that the plaintiff has been injured to the extent of \$10,000.¹⁸

§ 206. Photographs — X-rays — Maps — Diagrams, as evidence.

— Photographs, maps or diagrams, if they are accurate or fair representations of the *locus in quo* of an accident, are admissible in evidence as aids to the jury in understanding the situation and location,¹⁹ such as a photograph of a wrecked and broken bridge;²⁰ or of the scene of a personal injury;²¹ so a photograph of the injured parts of the person.²² But, to be admissible in evidence, they must be verified by proof that they are correct resemblances or true representations of the subject.²³ An *X-ray* photograph of a fracture, taken by a physician and surgeon familiar with fractures and with the process of taking such photographs, who testifies that it accurately represents the condition of the leg or arm, is admissible in evidence.²⁴ A plan

¹⁶ *Tanner v. Louisville &c. R. R. Co.*, 60 Ala. 621 (1877); *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15 (1879).

¹⁷ *Town of Albion v. Hetrick*, 90 Ind. 545 (1883). See *Hollenbeck v. City of Marshalltown*, 62 Iowa, 21 (1883); *Street R. R. Co. v. Nolthenius*, 40 Ohio St. 376 (1883).

¹⁸ *Central R. R. &c. Co. v. Kelly*, 58 Ga. 107 (1877).

¹⁹ *Archer v. New York &c. R. R. Co.*, 106 N. Y. 589 (1887); *Goldsboro v. Central R. R. Co.*, 31 Vr. 49 (1897); *Cunningham v. Fair Haven &c. R. R. Co.*, Conn. ; 43 Atl. Rep. 1047 (1899); *Beardslee v. Columbia Township*, 188 Pa. St. 496 (1898).

²⁰ *Locke v. Sioux City &c. R. R. Co.*, 46 Iowa, 109 (1877). Or of the car upon which the accident happened, but not the photograph of another car. *People's Passenger Ry. Co. v. Green*, 56 Md. 84 (1880).

²¹ When they bear evidence on their face of the correctness of

the representation of the scene depicted, in clearness of delineation, sharpness of outline, correct perspective and the just proportion between the various objects. *Nies v. Broadhead*, 75 Hun, 255 (1894); *Church v. City of Milwaukee*, 31 Wis. 512 (1872); *Blair v. Pelham*, 118 Mass. 420 (1875). Any difference that arises from the views being taken at a different season can be explained. *Dyson v. New York &c. R. R. Co.*, 57 Conn. 9 (1889); *Baker v. Town of Perry*, 67 Iowa, 146 (1885).

²² *Alberti v. New York &c. R. R. Co.*, 118 N. Y. 77 (1889); *Cowley v. People*, 83 id. 464 (1881).

²³ *Goldsboro v. Central R. R. Co.*, 31 Vr. 49 (1897); *Cunningham v. Fair Haven &c. R. R. Co.*, Conn. ; 43 Atl. Rep. 1047 (1899); *Beardslee v. Columbia Township*, 188 Pa. St. 496 (1898).

²⁴ *Bruce v. Beall*, 99 Tenn. 303 (1897).

or picture, however executed, if shown to be correct, is admissible.²⁵ A witness having described the place of the accident, the testimony of another witness as to measurements taken by him, of the place pointed out by the first witness, is competent, it appearing that the place pointed out and the place of the accident were the same.²⁶ So an expert witness may be permitted to make illustrations upon a blackboard before the jury for the purpose of explaining his testimony and rendering it more intelligible to them.²⁷ Whether the accuracy of a photograph, map or diagram is sufficiently proven is always a preliminary question for the court.²⁸ The accuracy of a photograph may be verified by any competent eye-witness as well as by the photographer who took it.²⁹

§ 207. Exhibits of physical objects — Injured parts of the person.— Parts of the structure, machinery or appliance which caused the injury may be exhibited to the jury,³⁰ or the plaintiff may exhibit to the jury the injured part of his person.³¹

²⁵ *Udderzook v. Commonwealth*, 76 Pa. St. 340 (1874); *Church v. City of Milwaukee*, 31 Wis. 512 (1872).

²⁶ *Keim v. Union Ry. &c. Co.*, 15 Mo. App. 593 (1885).

²⁷ *McKay v. Lasher*, 121 N. Y. 477 (1890). It is not error for the trial court to refuse an application to allow the jury to witness experiments with cars upon a railway track, outside of the courtroom, though bearing on the question of the probability of an alleged collision. *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1 (1884).

²⁸ *Blair v. Pelham*, 118 Mass. 420 (1875); *Hollenbeck v. Inhabitants of Rowley*, 8 Allen, 473 (1864); *Goldsboro v. Central R. R. Co.*, 31 Vr. 49 (1897); *Nies v. Broadhead*, 75 Hun, 255 (1894).

²⁹ *Thomas on Neg.*, p. 639; *Nies v. Broadhead*, 75 Hun, 255 (1894). See *Udderzook v. Commonwealth*, 76 Pa. St. 340 (1874).

³⁰ *King v. New York &c. R. R. Co.*, 72 N. Y. 607 (1878). But it is error to introduce pieces of a broken rail picked up at the place of the accident six months after the accident. *Stewart v. Everts*, 76 Wis. 35 (1890). The court may, in its discretion, refuse to permit the jury to view the premises where the plaintiff claims to have been injured. *Mulliken v. City of Coruma*, 110 Mich. 212 (1896).

³¹ *Indiana Car Co. v. Parker*, 100 Ind. 181 (1884); *Barker v. Town of Perry*, 67 Iowa, 146 (1885); *Mulhado v. Brooklyn City R. R. Co.*, 30 N. Y. 370 (1864); *Hess v. Lowrey*, 122 Ind. 225 (1889); *Louisville &c. Ry. Co. v. Wood*, 113 id. 544 (1887); *Schroeder v. Chicago &c. R. R. Co.*, 47 Iowa, 375 (1877); *Langworthy v. Township of Green*, 95 Mich. 93 (1893); *Cunningham v. Union Pacific Ry. Co.*, 4 Utah, 206 (1885); *Jordan v. Bowen*, 14 Jones & S. 355 (1880).

But in Illinois this was said to be within the discretion of the trial court.³²

§ 208. **Physical examination of the plaintiff — Before the trial — Statutes — How enforced.**—The power of the court to grant or order a physical examination of the plaintiff before the trial, has been passed upon by the courts of last resort in several of the States. In the absence of a statute there seem to be three distinct conclusions: *First.* That the court has no inherent power, in the absence of a statute conferring the right in advance of the trial of an action for personal injuries, to compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to testify at the trial, as to the existence or extent of the alleged injury. This is the rule of the United States Supreme Court, the Court of Appeals of New York and the Supreme Court of Indiana and Illinois.³³ *Second.* That the court has inherent power to make such an order.³⁴ *Third.* That the court has inherent power to make such

³² Chicago &c. R. R. Co. v. Clausen, 173 Ill. 100 (1898).

³³ Union Pacific Ry. Co. v. Botsford, 141 U. S. 250 (1891). This decision is based upon the ground that the jurisdiction of the United States Circuit Courts is limited by powers conferred by Congress and the Constitution. New York, McQuigan v. Delaware &c. R. R. Co., 129 N. Y. 50 (1891); Roberts v. Ogdenburg &c. R. R. Co., 29 Hun, 154 (1883); Winner v. Lothrop, 67 id. 511, 514 (1893); Newman v. Third Ave. R. R. Co., 18 Jones & S. 412 (1884); McSwyny v. Broadway &c. R. R. Co., 27 N. Y. St. Rep. 363 (1889), overruling Walsh v. Sayre, 52 How. Pr. 334 (1868); Shaw v. Van Rensselaer, 60 id. 143 (1880). Since authorized by statute. Chap. 721, Laws 1893, § 873, Code. Lyon v. Manhattan Ry. Co., 142 N. Y. 298 (1894). Indiana, Pennsylvania Co. v. Neumeyer, 129 Ind. 401, 409 (1891). See Terre Haute &c. R. R. Co. v. Brunner,

128 id. 554 (1891); Hess v. Lowrey, 122 id. 225, 233 (1889); Kern v. Bridwell, 119 id. 226, 229 (1889); Ind. Rev. Stats. 1881, chap. 2, § 538. Illinois, Joliet Street Ry. Co. v. Call, 143 Ill. 177, 182 (1892).

³⁴ This is the rule in

Alabama: Alabama &c. R. R. Co. v. Hill, 90 Ala. 71 (1889). In the discretion of the court. 31 Cent. L. J. 376, note. See McGuff v. State, 88 Ala. 147 (1889). The selection of a physician is entirely within the discretion of the trial judge; his refusal to appoint a particular physician at the instance of the defendant is not reversible on error or appeal. Alabama &c. R. R. Co. v. Hill, 93 Ala. 514 (1890).

Illinois: Chicago &c. R. R. Co. v. Holland, 122 Ill. 461 (1887); City of Galesburg v. Benedict, 22 Ill. App. 114 (1886); St. Louis Bridge Co. v. Miller, 138 Ill. 465 (1891). *Contra*, Parker v. Enslow, 102 id. 272 (1882); Joliet Street Ry. Co. v. Call, 143 id. 177 (1892).

an order where the injury is alleged to be permanent.³⁵ In some of the States there are statutes authorizing the courts to make such an order.³⁶ These statutes are not an infringement on the constitutional right of a party in a civil suit to be confronted by the witnesses.³⁷ In those courts which hold that it

Iowa: Leading case. *Schroeder v. Chicago &c. R. R. Co.*, 47 Iowa, 375 (1877).

Kansas: The court exercising in all such cases a sound judicial discretion. *Atchison &c. R. R. Co. v. Thul*, 29 Kan. 466 (1883).

Michigan: *Graves v. City of Battle Creek*, 95 Mich. 266 (1893).

Missouri: Discretionary with the court. *Sidekum v. Wabash &c. Ry. Co.*, 93 Mo. 400 (1887); *Owens v. Kansas City &c. R. R. Co.*, 95 id. 169 (1888); *Shepard v. Missouri &c. Ry. Co.*, 85 id. 629 (1885); *Kinney v. City of Springfield*, 35 Mo. App. 97 (1889). A refusal to make such an order will not be disturbed unless an abuse of such discretion is shown. *Norton v. St. Louis &c. Ry. Co.*, 40 Mo. App. 642 (1890), overruling *Loyd v. Hannibal &c. R. R. Co.*, 53 Mo. 509 (1873).

Nebraska: *Stuart v. Havens*, 17 Neb. 211 (1885); *Sioux City &c. R. R. Co. v. Finlayson*, 16 id. 578 (1884).

Ohio: *Miami &c. Co. v. Baily*, 37 Ohio St. 104 (1881).

Pennsylvania: *Hess v. Lake Shore &c. R. R. Co.*, 7 Pa. Co. Ct. Rep. 565 (1890).

Texas: *International &c. Ry. Co. v. Underwood*, 64 Tex. 463 (1885); *Missouri &c. R. R. Co. v. Johnson*, 72 Tex. 95 (1888). *Contra*, *Gulf &c. Ry. Co. v. Pendery*, 14 Tex. Civ. App. 60 (1896).

Wisconsin: *White v. Milwaukee &c. R. R. Co.*, 61 Wis. 536 (1884).

³⁵ But where the evidence of ex-

perts is already abundant, the court must exercise its sound discretion and its action is subject to review in case of abuse. This is the rule in

Arkansas: *Sibley v. Smith*, 46 Ark. 275 (1885).

Georgia: *Richmond &c. R. R. Co. v. Childress*, 82 Ga. 719 (1889). For a discussion of this subject see *Ray on Negligence of Imposed Duties*, chap. 35, § 190; 1 *Thompson on Trials*, § 859.

³⁶ New Jersey: *P. L.* 1896, chap. 202, p. 344. When the action is pending in the Supreme Court, application to examine the plaintiff must be made to the court and not to a single judge. *Hagan v. Hoboken &c. Electric Ry. Co.*, N. J. L. J. March, 1898, p. 82; *McGovern v. Hope*, Vr. ; 42 *Atl. Rep.* 830 (1899).

New York: Chap. 721, Laws 1893, § 873, Code. *Lyon v. Manhattan Ry. Co.*, 7 Misc. 401 (1894); affirmed by the Court of Appeals, 142 N. Y. 298 (1894). Sufficiency of the affidavit to procure such examination. See *Green v. Middlesex R. R. Co.*, 10 Misc. 473 (1894).

³⁷ *McGovern v. Hope*, Vr. ; 42 *Atl. Rep.* 830 (1899). In that case it was said the court should give the parties an equal opportunity of having qualified witnesses present at the examination, which should be so conducted as to subject plaintiff to no unnecessary annoyance or exposure of her person.

has inherent power to make such an order, it has been enforced by refusing to try the case until a compliance is had with the order,³⁸ or the action may be dismissed.³⁹

§ 209. **Physical examination of the plaintiff — At the trial.**—

The same question has arisen, viz., the power of the court to order an examination at the trial. It has been held that an application made during the trial may be denied; if desired, it should be made before the trial begins,⁴⁰ especially where no reason is shown for the delay,⁴¹ or if it appears to the court as not necessary.⁴² Never, when the party is willing to be examined by competent and disinterested surgeons, without such order.⁴³ A refusal by the plaintiff to permit himself to be examined by a particular expert, who is obnoxious to him, will not afford ground for reversal when the plaintiff expressed his willingness to be examined by any other respectable physician.⁴⁴ In Minnesota, it was held that the court had the power, in a proper case, to compel the plaintiff to perform a physical act in the presence of the jury, to show the nature and extent of the injuries.⁴⁵ A refusal to afford an opportunity for a physical examination of the injured person may be

³⁸ *Hess v. Lake Shore &c. R. R. Co.*, 7 Pa. Co. Ct. Rep. 565 (1890). Or refuse to allow the plaintiff to give evidence to establish the injury. *Miami &c. Co. v. Baily*, 37 Ohio St. 104 (1881).

³⁹ *Miami &c. Co. v. Baily*, 37 Ohio St. 104 (1881); *Shepard v. Missouri Pacific Ry. Co.*, 85 Mo. 629, 634. (1885).

⁴⁰ *Stuart v. Havens*, 17 Neb. 211 (1885); *Sioux City &c. R. R. Co. v. Finlayson*, 16 id. 578 (1884).

⁴¹ *Miami &c. Co. v. Baily*, 37 Ohio St. 104 (1881); *Hess v. Lowrey*, 122 Ind. 225 (1889); *Terre Haute &c. R. R. Co. v. Bruncker*, 128 id. 554 (1891); *Kinney v. City of Springfield*, 35 Mo. App. 97 (1889); *Sidekum v. Wabash &c. Ry. Co.*, 93 Mo. 400 (1887); *City of Galesburg v. Benedict*, 22 Ill. App. 111, 114 (1886).

⁴² *Sioux City &c. R. R. Co. v. Finlayson*, 16 Neb. 578 (1884); *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 472 (1891); *Joliet Street Ry. Co. v. Call*, 143 id. 177, 181 (1892).

⁴³ *Gulf &c. Ry. Co. v. Norfleet*, 78 Tex. 321 (1890); *International &c. Ry. Co. v. Underwood*, 64 id. 463 (1885); *Sioux City &c. R. R. Co. v. Finlayson*, 16 Neb. 578 (1884).

⁴⁴ *Missouri &c. R. R. Co. v. Johnson*, 72 Tex. 95, 101 (1888).

⁴⁵ Such as to require the plaintiff to walk across the courtroom in the presence of the jury. But the propriety of doing so in a given case rests largely in the discretion of the trial court. *Hatfield v. St. Paul &c. R. R. Co.*, 33 Minn. 136 (1885).

shown;⁴⁶ it is competent evidence against the plaintiff as bearing upon his good faith.⁴⁷ Physicians appointed by the court, to make examination of the physical injuries of the plaintiff, become the witnesses of the court, and if the parties refuse to call them the court has a right to do so.⁴⁸

§ 210. **Books of inductive science.**— Books of inductive science, such as standard medical works, are inadmissible in evidence to prove the opinions contained in them.⁴⁹ The reason for excluding such books is that they are statements wanting the sanction of an oath, and the statements therein contained are made by one not present and not liable to cross-examination.⁵⁰ In Connecticut it was held that standard medical works

⁴⁶ *City of Freeport v. Isbell*, 93 Ill. 381 (1879). Not where the court refused to make an order on the ground that the application was not made at an earlier date.

Kinney v. City of Springfield, 35 Mo. App. 97 (1889). See *Pennsylvania Co. v. Neumeyer*, 129 Ind. 401, 412 (1891).

⁴⁷ *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250 (1891). Not until after the court had made the order and plaintiff had then refused. *Kinney v. City of Springfield*, 35 Mo. App. 97 (1889).

⁴⁸ *Fordyce v. St. Louis &c. Ry. Co.*, 144 Mo. 519 (1898).

⁴⁹ England: *Collier v. Simpson*, 5 Car. & P. 73 (1831).

California: *Gallagher v. Market Street R. R. Co.*, 67 Cal. 13 (1885).

Illinois: *North Chicago Rolling Mill v. Monka*, 107 Ill. 340 (1883); *Connecticut Mut. Ins. Co. v. Ellis*, 89 id. 516 (1878).

Indiana: "Evans Millwright Guide." *Corey v. Silcox*, 6 Ind. 39 (1854); *Epps v. State*, 102 id. 539 (1885).

Iowa: *Broadhead v. Wiltse*, 35 Iowa, 429 (1872). See Rev., § 3395; *Quackenbush v. Chicago &c.*

Ry. Co., 35 Iowa, 429 (1872); 35 N. W. Rep. 523 (1887).

Maryland: *Davis v. State*, 38 Md. 15 (1873).

Massachusetts: *Ashworth v. Kittridge*, 12 Cush. 93 (1853); *Commonwealth v. Wilson*, 1 Gray, 337 (1854).

Michigan: *Pinney v. Cahill*, 48 Mich. 584 (1882); 22 Am. L. Reg. (N. S.) 104.

New Jersey: *New Jersey Zinc &c. Co. v. Lehigh Zinc &c. Co.*, 30 Vr. 189 (1896).

New York: *Harris v. Panama R. R. Co.*, 3 Bosw. 7 (1858).

North Carolina: *Huffman v. Click*, 77 No. Car. 55 (1877); *Melvin v. Easbey*, 1 Jones, 386 (1854).

Texas: *Fowler v. Lewis*, 25 Tex. 380 (1860). See *Wade v. De Witt*, 20 id. 398 (1857).

Wisconsin: *Stilling v. Town of Thorp*, 54 Wis. 528 (1882); *Boyle v. State*, 57 id. 472 (1883); *City of Ripon v. Bittel*, 30 id. 614 (1872); *Kreuziger v. Chicago &c. Ry. Co.*, 73 id. 158 (1888); *Waterman v. Chicago &c. R. R. Co.*, 82 id. 613 (1892).

⁵⁰ *Ashworth v. Kittridge*, 12 Cush. 193 (1853); *Whart. on Ev.*, § 665.

on insanity may be read to the jury by the counsel for the accused, upon the question of his insanity. A long practice, the court said, has established this rule in that State.⁵¹ It is not competent for a medical expert to read from and testify to what is in the book,⁵² nor to read from the book to the jury, although the witness testifies that he concurs in the views therein expressed.⁵³ But a book which a witness has cited to sustain his views may be used to contradict or discredit him.⁵⁴ So, on cross-examination, it has been held proper, in order to test the learning of an expert witness, to refer to books of approved authority upon the subject under investigation.⁵⁵

§ 211. Books of exact science — Standard mortuary tables.—

Books of exact science and mortuary tables of undisputed accuracy, such as the Northampton Tables, American Tables of Mortality, Wigglesworth's, Carlisle Tables, and the like, showing the life expectancy, or the probable duration of life, recognized by the court as accurate, or shown to be such by the testimony of a qualified witness, are competent, and may, when the probable duration of life is a subject of inquiry, be read in evidence.⁵⁶ In Illinois a book on mechanics was held incompe-

⁵¹ State v. Hoyt, 46 Conn. 330 (1878).

⁵² Marshall v. Brown, 50 Mich. 148 (1883). Nor for counsel to read such to the jury. Boyle v. State, 57 Wis. 472 (1883).

⁵³ Commonwealth v. Sturtivant, 117 Mass. 123 (1875).

⁵⁴ City of Ripon v. Bittel, 30 Wis. 614 (1872); Huffman v. Click, 77 No. Car. 55 (1877); 24 Alb. L. J. 268; New Jersey Zinc &c. Co. v. Lehigh Zinc &c. Co., 30 Vr. 189 (1896); Hess v. Lowrey, 122 Ind. 225 (1889); Gallagher v. Market Street Ry. Co., 67 Cal. 13 (1885); Pinney v. Cahill, 48 Mich. 584 (1882). Otherwise of a book not cited. Knoll v. Slate, 55 Wis. 249 (1882).

⁵⁵ Hess v. Lowrey, 122 Ind. 225 (1889). He may be asked if he agrees with the author on cross-

examination as one of the means of testing his knowledge, and this is, in no just sense, reading such books to the jury. Connecticut Mut. Life Ins. Co. v. Ellis, 89 Ill. 516 (1878); Fisher v. Southern Pacific R. R. Co., 89 Cal. 399 (1891).

⁵⁶ Abb. Tr. Ev. 724; 22 Am. L. Reg. 105, n.; 59 Am. Dec. 185, n.; 15 Am. & Eng. Ency. of Law (1st ed.), 882; Huffman v. Click, 77 No. Car. 55, 58 (1877); Coates v. Burlington &c. Ry. Co., 62 Iowa, 486 (1883); Scheffler v. Minneapolis &c. Ry. Co., 32 Minn. 518 (1884); Vicksburg &c. R. R. Co. v. Putnam, 118 U. S. 545 (1886); Hunn v. Michigan Cent. R. R. Co., 78 Mich. 513 (1889); Sauter v. New York &c. R. R. Co., 66 N. Y. 50 (1876). Carlisle tables. Camden &c. R. R. Co. v. Williams, 32 Vr. 646 (1898); Blair v. Madison County, 81 Iowa, 313

tent.⁵⁷ The court will take judicial notice of their genuineness.⁵⁸ In ascertaining the damages to be awarded for impaired ability to earn a livelihood, standard life and annuity tables are competent evidence to be considered.⁵⁹ When the injury is permanent, the expectancy of plaintiff's life must be considered. The life tables are admissible for that purpose, the damage being, continuing and ending only with the plaintiff's life, or with his inability to labor on account of age.⁶⁰ A standard mortuary table must be proved to be authentic, and its character and office should be explained to the jury.⁶¹

§ 212. **Failure to perform a duty imposed by statute.**—Where a statute imposes a duty upon an individual or corporation, any person having a special interest in the performance thereof may sue for a breach, causing him injury.⁶² The failure to perform

(1890). "Forrey on Catechism of a Locomotive." *Sioux City &c. R. R. Co. v. Finlayson*, 16 Neb. 578, 587 (1884). Held, not admissible where the deceased was under ten years of age. *Rajnowski v. Detroit &c. R. R. Co.*, 74 Mich. 20 (1889).

⁵⁷ *North Chicago Rolling Mills Co. v. Monka*, 107 Ill. 340 (1883). So in New Jersey. "Whitney's Metallic Wealth of the United States;" *New Jersey Zinc &c. Co. v. Lehigh Zinc &c. Co.*, 30 Vr. 189, 192 (1896).

⁵⁸ *Scheffler v. Minneapolis &c. Ry. Co.*, 32 Minn. 518 (1884). "Carlisle's Table of Mortality" may be assumed to be a standard table. *Camden &c. R. R. Co. v. Williams*, 32 Vr. 646 (1898).

⁵⁹ *Whelan v. New York &c. R. R. Co.*, 38 Fed. Rep. 15 (1889); *Arkansas &c. Ry. Co. v. Griffith*, 63 Ark. 491 (1897). If the facts are found and made definite which form a basis for a computation from the principle on which annuities are purchased, the jury may properly use annuity tables

in estimating the amount to be allowed. *Rooney v. New York &c. R. R. Co.*, Mass. ; 6 Am. Neg. Rep. 78 (1899). The practical difficulty in using annuity tables in such cases pointed out. *Ib.*

⁶⁰ *Knapp v. Sioux City &c. Ry. Co.*, 71 Iowa, 41 (1887).

⁶¹ *Camden &c. R. R. Co. v. Williams*, 32 Vr. 646 (1898).

⁶² *Willy v. Mulledy*, 78 N. Y. 310 (1879). In that case the statute required that owners of tenement-houses in the city of Brooklyn should have fire-escapes upon such houses. It was held, in an action to recover damages for the death of plaintiff's wife, that this duty is for the benefit of the tenants, and for a breach thereof, causing damage, a tenant may maintain an action against his landlord. *Donnegan v. Erhardt*, 119 N. Y. 468 (1890); *Indiana &c. Ry. Co. v. Barnhart*, 115 Ind. 399 (1888); *Morton v. Smith*, 48 Wis. 265 (1879); *Wise v. Morgan*, 101 Tenn. 273 (1898). See *Grant v. Slate Mill &c. Co.*, 14 R. I. 380 (1884); *Shearm. & Redf. on Neg.* (5th ed.), §§ 13, 467.

a duty imposed by statute, where, as the consequence, an injury results to another, is evidence upon the question of negligence of the party chargeable with such failure.⁶³

§ 213. **Violation of ordinances, as evidence.**— The violation of an ordinance is some evidence of negligence, but not necessarily negligence.⁶⁴ In 1876 it was said by the Court of Appeals of New York to be an open question in that court whether the violation of a municipal ordinance was negligence *per se*,⁶⁵ but it was subsequently held not to be conclusive.⁶⁶ Proof of a municipal ordinance and a violation thereof is held, by all the cases, to be competent evidence upon the question of negligence to be submitted to the jury.⁶⁷ In a case in Maryland it was said that if a railroad company does not conform to the city ordinances, providing certain safeguards in the use of its engines, it is not in the lawful pursuit of its business, and is responsible for any injury which it may occasion, if the party injured be

⁶³ *McRickard v. Flint*, 114 N. Y. 222, 226 (1889); *Connolly v. Knickerbocker Ice Co.*, id. 104 (1889); *Georgia Pacific Ry. Co. v. Hughes*, 87 Ala. 610 (1888). Under a mining statute. *Bartlett Coal & C. Co. v. Roach*, 68 Ill. 174 (1873); *Consolidated Coal Co. v. Bokamp*, Ill. ; 54 N. E. Rep. 567 (1899); *Carrell v. Burlington & C. R. R. Co.*, 38 Iowa, 120 (1874); *Huckshold v. St. Louis & C. Ry. Co.*, 90 Mo. 548 (1886).

⁶⁴ *McGrath v. New York & C. R. R. Co.*, 63 N. Y. 522 (1876); *Lane v. Atlantic Works*, 111 Mass. 136 (1872); *Hanlon v. South Boston Horse R. R. Co.*, 129 id. 310 (1880). Running a train of cars through a city at a rate of speed prohibited by ordinance raises a presumption of negligence; it is not negligence itself, but merely raises a presumption of negligence. *Illinois Central R. R. Co. v. Ashline*, 171 Ill. 313 (1898).

⁶⁵ *Massoth v. Delaware & C. Canal Co.*, 64 N. Y. 531 (1876).

⁶⁶ *Knupfle v. Knickerbocker Ice*

Co., 84 N. Y. 488 (1881); *Meek v. Pennsylvania Co.*, 38 Ohio St. 632 (1883).

⁶⁷ *Jetter v. New York & C. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; 2 Keyes, 154 (1865), overruling *Prown v. Buffalo & C. R. R. Co.*, 22 N. Y. 191 (1860). To the same effect are *McGrath v. New York & C. R. R. Co.*, 63 N. Y. 522 (1876); *Massoth v. Delaware & C. Canal Co.*, 64 id. 524 (1876); *Briggs v. New York & C. R. R. Co.*, 72 id. 26 (1876); *Knupfle v. Knickerbocker Ice Co.*, 84 id. 488 (1881); *Atlanta Cons. Street Ry. Co. v. Foster*, Ga. ; 33 S. E. Rep. 886 (1899). See § 23; *Shearm. & Redf. on Neg.* (5th ed.), § 13; *Lane v. Atlantic Works*, 111 Mass. 136 (1872); *Isabel v. Hannibal & C. R. R. Co.*, 60 Mo. 475 (1875); *Meek v. Pennsylvania Co.*, 38 Ohio St. 632 (1883); *Pennsylvania Co. v. Hensil*, 70 Ind. 569 (1880); *Western & C. R. R. Co. v. Meigs*, 74 Ga. 857 (1885); *Siemers v. Eisen*, 54 Cal. 418 (1880). See *Dolfinger v. Fishback*, 12 Bush, 474 (1876).

not in fault.⁶⁸ So it has been held in some of the other States that a failure to comply with a city ordinance in running trains is negligence *per se*;⁶⁹ that it may be proved, although the existence of the ordinance is not pleaded.⁷⁰ An ordinance which limits the rate of speed of railroad trains to less than that permitted by statute is inadmissible;⁷¹ a city ordinance prohibiting the use of the whistle by railroad trains is admissible.⁷² So, in an action against a municipality to recover damages for injuries sustained by falling into an unguarded area-way, it is proper to admit in evidence an ordinance of the city requiring such openings to be properly guarded.⁷³

§ 214. Evidence of the speed of railroad trains.— The rate of speed at which a railroad train was running at the time of the injury, may be considered by the jury in determining the question of negligence.⁷⁴ Testimony as to the speed of trains should not be merely relative, without some standard of rapidity, but it should show approximately, at least, the actual rate, and that should be shown to be unsafe, before the question whether it was negligent can be left to the jury.⁷⁵ The fact that a train

⁶⁸ Baltimore &c. R. R. Co. v. State, 29 Md. 252 (1868). See Cumberland &c. R. R. Co. v. State, 73 id. 74 (1890); Philadelphia &c. R. R. Co. v. Stebbing, 62 id. 504 (1884); Reidel v. Philadelphia &c. R. R. Co., 87 id. 153 (1897).

⁶⁹ Missouri: Karle v. Kansas City &c. R. R. Co., 55 Mo. 476 (1874); Neiver v. Missouri Pacific Ry. Co., 12 Mo. App. 25 (1882); Schlereth v. Missouri &c. Ry. Co., 96 Mo. 509 (1888). So in

Georgia: Western &c. R. R. Co. v. Young, 81 Ga. 397 (1888); Central R. R. Co. v. Curtis, 87 id. 416 (1891).

Minnesota: Leaving horse unhitched in street in violation of ordinance. Bott v. Pratt, 33 Minn. 323 (1885).

Wisconsin: Smith v. Milwaukee Builders &c. Exch., 91 Wis. 360 (1895).

⁷⁰ Faber v. St. Paul &c. Ry. Co., 29 Minn. 465 (1882).

⁷¹ Chicago &c. R. R. Co. v. Dougherty, 12 Ill. App. 181 (1882).

⁷² Pennsylvania Co. v. Hensil, 70 Ind. 569 (1880).

⁷³ McNerney v. Reading City, 150 Pa. St. 611 (1892).

⁷⁴ Martin v. New York &c. R. R. Co., 27 Hun, 532 (1882); Worthen v. Grand Trunk Ry. Co., 125 Mass. 99 (1878); Pennsylvania Co. v. Conlan, 101 Ill. 93 (1881); Missouri &c. Ry. Co. v. Collier, 62 Tex. 318 (1884).

⁷⁵ Grand Rapids &c. R. R. Co. v. Huntley, 38 Mich. 537 (1878). But a witness may testify that a train was "running fast" without indicating the rate of speed. Illinois Central R. R. Co. v. Ashline, 171 Ill. 313 (1898).

of cars was running at a rate of speed faster than usual is not, of itself, sufficient to establish negligence.⁷⁶ Outside of cities, towns and villages, no rate of speed, however great, is alone sufficient evidence to establish negligence.⁷⁷ The reasonable rule is that the highest rate of speed consistent with the safety of the passengers is proper and legitimate.⁷⁸ A witness may testify how far the train by which the deceased was struck ran, after striking him, in order to show its speed.⁷⁹ Passengers, while riding, are not presumed to form such habits of observation as will make their opinion as to the speed of trains reliable.⁸⁰ Evidence of the speed of a train of cars, as judged by the sound, is admissible, but the weight of such evidence is for the jury.⁸¹ It is not a question of science, but of observation.⁸² Evidence of the distance within which a train or car could have been stopped is admissible,⁸³ for the purpose of showing either negligence in failing to stop, or negligence in

⁷⁶ *Plaster v. Illinois Central R. Co.*, 35 Iowa, 449 (1872); *Chesapeake & C. Ry. Co. v. Cloues*, 93 Va. 189 (1896).

⁷⁷ *Omaha & C. Ry. Co. v. Krayenbuhl*, 48 Neb. 553 (1896); *New York & C. R. R. Co. v. Kellam*, 83 Va. 851 (1887); *Doggett v. Richmond & C. R. R. Co.*, 81 No. Car. 459 (1879); *Newhard v. Pennsylvania R. R. Co.*, 153 Pa. St. 417, 424 (1893).

⁷⁸ *Houston v. Vicksburg & C. R. R. Co.*, 39 La. Ann. 796 (1887). See *Shearm. & Redf. on Neg.* (5th ed.), § 460.

⁷⁹ *Pennsylvania Co. v. Colan*, 101 Ill. 93 (1881).

⁸⁰ *Grand Rapids & C. R. R. Co. v. Huntley*, 38 Mich. 537 (1878). Remarks of a fellow passenger to the witness, as to the speed of the train, made while it is moving, are admissible when that fact is in issue. *Missouri & C. Ry. Co. v. Collier*, 62 Tex. 318 (1884). One accustomed to observe moving objects and form an estimate of

their rate of speed, is competent to give his opinion as to the rate of speed at which a particular train was moving at the time of the accident. *Detroit & C. R. R. Co. v. Van Steinburg*, 17 Mich. 99 (1868); *Pence v. Chicago & C. Ry. Co.*, 79 Iowa, 389 (1890); *Louisville & C. Ry. Co. v. Hendricks*, 128 Ind. 462 (1892).

⁸¹ *Van Horn v. Burlington & C. Ry. Co.*, 59 Iowa, 33 (1882).

⁸² *Detroit & C. R. R. Co. v. Van Steinburg*, 17 Mich. 99 (1868).

⁸³ *Meagher v. Cooperstown & C. R. R. Co.*, 75 Hun, 455 (1894); 27 N. Y. Supp. 504; *Wren v. Louisville & C. R. R. Co.*, Ky. ; 20 S. W. Rep. 215 (1892); *Reardon v. Missouri Pac. Ry. Co.*, 114 Mo. 384 (1892). In *O'Neil v. Dry Dock & C. R. R. Co.*, 129 N. Y. 125 (1891), the Court of Appeals of New York said within what time and space a loaded truck can be stopped is barely competent and this class of testimony was not to be encouraged.

keeping cars in an improper condition. So is evidence of the distance which a train or car actually ran before it could be stopped.⁸⁴

§ 215. **Evidence of injury and damages.**— The burden of proof is upon the plaintiff to establish the extent of the injury and the amount of damages he is entitled to recover.⁸⁵ The opinion of the plaintiff that he has been injured to the extent of \$10,000 is inadmissible.⁸⁶ Evidence of the pecuniary circumstances of the plaintiff is inadmissible;⁸⁷ or of the defendant;⁸⁸ or evidence of what family the plaintiff has, since the damages allowed are for the injury inflicted on him and not on his family.⁸⁹ Under a general allegation of injury, the plaintiff cannot introduce evidence of injury in his special calling or occupation.⁹⁰ Where it was claimed by the defendant that exercise taken by the plaintiff tended to retard recovery, the plaintiff may show that he was advised by his physician that it was proper and beneficial to exercise.⁹¹ On a second trial, it is admissible to show, for the first time, that Bright's disease of the kidneys was a consequence of the injury.⁹² The plaintiff having proved that his arm was mangled and crushed, no further evidence that he suffered pain is necessary to justify the jury in making the pain suffered an element of damage, or that his injury will impair his ability to pursue his calling as a brakeman.⁹³ Evidence is unnecessary to show that the loss of an arm reduces the plaintiff's capacity to earn money.⁹⁴ Damages for permanent injury

⁸⁴ *Oliver v. North End Street Ry. Co.*, 170 Mass. 222 (1898); *Pennsylvania Co. v. Colan*, 101 Ill. 93 (1881).

⁸⁵ *Savannah &c. Ry. Co. v. Stewart*, 71 Ga. 427 (1883).

⁸⁶ *Central R. R. &c. Co. v. Kelly*, 58 Ga. 107 (1877).

⁸⁷ *Eagle Packet Co. v. Defries*, 94 Ill. 598 (1880). Wealth or poverty of the survivors. *Beard v. Skeldon*, 13 Ill. App. 54 (1883). That the person injured was poor and depended on labor for support may be admissible. *Graves v. Thomas*, 95 Ind. 361 (1883).

⁸⁸ *Morgan v. Durfee*, 69 Mo. 469 (1879). May be admissible when exemplary damages are allowed.

⁸⁹ *Louisville &c. R. R. Co. v. Binion*, 107 Ala. 645 (1894).

⁹⁰ *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516 (1883).

⁹¹ *Lyons v. Erie Ry. Co.*, 57 N. Y. 489 (1874).

⁹² *City of Freeport v. Isbell*, 93 Ill. 381 (1879).

⁹³ *Chicago &c. R. R. Co. v. Warner*, 108 Ill. 538 (1883).

⁹⁴ *Texas &c. Ry. Co. v. O'Donnell*, 58 Tex. 27 (1882). See § 216.

may be recovered without a special allegation to that effect.⁹⁵ In Vermont it was held that the services of a physician might be recovered under a declaration of general damages.⁹⁶

§ 216. **Expressions of pain — Made to physicians or other persons.**— The plaintiff may testify as to his pain, suffering or internal condition.⁹⁷ So evidence of expressions of pain, or exclamations which are natural concomitants and manifestations of pain or suffering, made at the time of an injury, are competent, because they are regarded as involuntary and natural expressions, which a witness may describe, for the same reason that he may describe the appearance of the party.⁹⁸ Complaints of suffering, to be admissible, need not have been made to a nurse or physician.⁹⁹ Complaints and expressions of pain made to a physician, while under physical examination, are admissible.¹ Such expressions, when made to a physician who was called in, not for the purpose of giving medical aid, but to make up medical testimony, are inadmissible.² Or if made to

⁹⁵ *Tyler v. Third Ave. R. R. Co.*, 41 N. Y. Supp. 523 (1896).

⁹⁶ *Folsom v. Town of Underhill*, 36 Vt. 580 (1864). See § 84.

⁹⁷ *Wright v. City of Fort Howard*, 60 Wis. 119 (1884). See *Atchison &c. R. R. Co. v. Johns*, 36 Kan. 769 (1887).

⁹⁸ *Hagenlocher v. Coney Island &c. R. R. Co.*, 99 N. Y. 136 (1885); *Kennedy v. Rochester City &c. R. R. Co.*, 130 id. 654 (1891); *Cleveland &c. R. R. Co. v. Newell*, 104 Ind. 264 (1885); *Werely v. Persons*, 28 N. Y. 344 (1863); *Jackson County v. Nichols*, 139 Ind. 611 (1894); *Burleson v. Village of Reading*, 110 Mich. 512 (1896); *Whart. on Neg.*, § 268; *Thompson on Neg.*, p. 604.

⁹⁹ *Brown v. Town of Mt. Holly*, 69 Vt. 364 (1897).

¹ *Matteson v. New York &c. R. R. Co.*, 35 N. Y. 487 (1866); *Quaife v. Chicago &c. Ry. Co.*, 48 Wis. 513 (1879); *Bridge v. City of Osh-*

kosh, 67 id. 195 (1886); *Louisville &c. Ry. Co. v. Falvey*, 104 Ind. 409 (1885); *Cleveland &c. R. R. Co. v. Newell*, id. 264 (1885). Not competent to prove by the plaintiff what the surgeon said to him. *Alabama &c. R. R. Co. v. Arnold*, 80 Ala. 600 (1886); *Delaware &c. R. R. Co. v. Roalefs*, 70 Fed. Rep. 21 (1891); *Northern Pacific R. R. Co. v. Umlin*, 158 U. S. 271 (1894); *East Tennessee &c. R. R. Co. v. Smith*, 94 Ga. 580 (1894); *Mulliken v. City of Coruma*, 110 Mich. 212 (1896); 1 *Rice on Ev.*, p. 377.

² *Stewart v. Everts*, 76 Wis. 35 (1890); *Grand Rapids &c. R. R. Co. v. Huntley*, 38 Mich. 537 (1878); *McKormick v. City of West Bay City*, 110 id. 265 (1896); *Cleveland &c. R. R. Co. v. Newell*, 104 Ind. 604 (1885). Declarations made to a physician as to the cause of the injury are inadmissible. *Illinois Central R. R. Co. v. Sutton*, 42 Ill. 438 (1867); *Roosa v. Boston Loan*

another than the attending physician, not being part of the *res gestae*, they are inadmissible.³

§ 217. **Actions for causing death.**— It is said that courts incline to great liberality in actions brought for causing death, in allowing the questions of the negligence of the defendant, and of the contributory negligence of the plaintiff, to go to the jury upon slight evidence,⁴ and this for the reason that, on account of the death of the person injured, it is impossible to make the proof with the same precision and fullness as if the person injured was alive and able to testify,⁵ although the rules of evidence and the law governing the right of recovery are the same as in other cases.⁶ There must be allegations and proof of such facts as would entitle the deceased to maintain an action, if death had not ensued.⁷ The fact of survivorship and the name of the widow or next of kin must be shown,⁸ as well as the pecuniary loss resulting from the death.⁹ When one sues to recover damages for causing the death of another, claiming to have been his wife at the time of his death, and there is no question as to the deceased leaving any other wife or next of kin, the fact of the plaintiff's marriage with the

Co., 132 Mass. 439 (1882); Boston &c. R. R. Co. v. O'Reilly, 158 U. S. 334 (1894); Atlanta Street R. R. Co. v. Walker, 93 Ga. 462 (1893).

³ Kennedy v. Rochester City &c. R. R. Co., 130 N. Y. 654 (1891); Roche v. Brooklyn City &c. R. R. Co., 105 id. 294 (1887); Cleveland &c. R. R. Co. v. Newell, 104 Ind. 264 (1885). In a New York case it was held that a witness might testify that three months after the accident, plaintiff, with whom the witness slept, would sit upon the edge of the bed and complain of pain in her arm and shoulder, that such expressions of pain were admissible on the ground as tending to characterize and explain her act in so sitting on the bed. Nichols v. Brooklyn City R. R. Co.,

30 Hun, 437 (1883), Pratt, J., dissenting.

⁴ Tiffany on Death by Wrongful Act, § 189; Galvin v. Mayor &c. of New York, 112 N. Y. 223, 229 (1889); Rodrian v. New York &c. R. R. Co., 125 id. 526, 529 (1891); McNulta v. Lockridge, 137 Ill. 270 (1891).

⁵ *Ib.*

⁶ Rodrian v. New York &c. R. R. Co., 125 N. Y. 526, 529 (1891).

⁷ Holton v. Daly, 106 Ill. 131 (1882).

⁸ Holton v. Daly, 106 Ill. 131 (1882); Grand Trunk Ry. Co. v. Ives, 144 U. S. 408 (1891).

⁹ Hurst v. Detroit City Ry. Co., 84 Mich. 539 (1891); Staal v. Grand Street &c. R. R. Co., 107 N. Y. 625 (1887).

deceased is material.¹⁰ If there are several claimants, the question is immaterial, as the probate court, on distribution, will settle it.¹¹ The testimony of the widow that the deceased was her husband, that they had lived together seventeen years, is sufficient to establish the fact of marriage.¹² In those States where the procedure for causing death by negligence is by indictment, and, therefore, necessarily criminal in form, it is to be considered and treated as a civil action for the recovery of damages in its main features, the same rules of evidence and principles of law should be applied in such cases as in analogous civil actions for damages.¹³ Under the Massachusetts statute, the burden of proof is upon the plaintiff to show that the death was not instantaneous.¹⁴ Many, if not all, the States have enacted statutes permitting any party in a civil action to be sworn and examined as a witness, notwithstanding any party thereto may sue, or be sued, in a representative capacity, but excluding testimony to be given as to any transaction with, or statement by any testator or intestate represented in said action.¹⁵ Many of these statutes differ greatly in phraseology; each statute, and the decisions of the courts construing it, will have to be

¹⁰ Toledo &c. Ry. Co. v. Brooks, 81 Ill. 245 (1876); Conant v. Griffin, 48 id. 410 (1868).

¹¹ Conant v. Griffin, 48 Ill. 410 (1868).

¹² White v. Maxey, 64 Mo. 552 (1877). A photograph shown by a widow to be a good likeness of her husband, an indorsement thereon, in his handwriting, of his name, date, the place of its execution, are admissible in evidence to show the identity of the husband, when offered in connection with the testimony of the photographer, that it was the likeness of a man of the same name as her husband taken at the place, about the same time indorsed on it; and the further evidence of a witness who saw the deceased shortly be-

fore and after death, that it was a good likeness. Luke v. Calhoun County, 52 Ala. 115 (1875).

¹³ State v. Grand Trunk Ry. Co., 58 Me. 176 (1870); State v. Manchester &c. R. R. Co., 52 N. H. 528 (1873). In Mass. Pub. Stats. 1882, chap. 112, § 212, the procedure against a corporation operating a railroad is by indictment. So in Me. Rev. Stats. 1883, chap. 51, § 68. Formerly it was so in New Hampshire. State v. Manchester &c. R. R. Co., 52 N. H. 528 (1873).

¹⁴ Riley v. Connecticut River R. Co., 135 Mass. 292 (1883); Corcoran v. Boston &c. R. R. Co., 133 id. 507 (1882). See Moran v. Hollings, 125 id. 93 (1878).

¹⁵ See N. J. P. L. 1880, p. 52.

consulted for their precise application in the several States. It is not within the scope of this book to collate these statutes.¹⁶

§ 218. **Testimony of deceased witnesses.**—The testimony of a deceased witness is admissible in a subsequent suit relating to the same subject-matter.¹⁷ Such testimony given in a suit by the intestate for personal injury is competent in a suit brought

¹⁶ See standard books on the law of evidence. As applied to accident cases the following may prove useful:

Georgia: Where the action is brought in the name of the beneficiary the defendant is not excluded from testifying. *McEwen v. Springfield*, 64 Ga. 159 (1879).

Missouri: The same as Georgia. *Entwistle v. Feighner*, 60 Mo. 214 (1875).

Pennsylvania: *Mann v. Weiland*, 81 Pa. St. 243 (1875); Act of April 15, 1869, of Pa.

Texas: *Wallace v. Stevens*, 74 Tex. 559 (1889); under art. 2248, Rev. Stats. of Tex.

Illinois: Where the action is brought in the name of the executor or administrator the defendant is excluded from testifying. *Forbes v. Snyder*, 94 Ill. 374 (1880). Applied to the president of a corporation who is also a stockholder. *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481 (1890).

Indiana: Same as Illinois. *Sherlock v. Alling*, 44 Ind. 184 (1873); *Hudson v. Houser*, 123 id. 309 (1889). Widow is competent, for the plaintiff, in an action by the administrator of her husband. *Louisville &c. Ry. Co. v. Thompson*, 107 Ind. 442 (1886).

Missouri: A husband, who is a co-plaintiff with his wife in an action for the death of their son, is competent. *Bell v. Hannibal &c.*

Ry. Co., 86 Mo. 599 (1885). So is the wife in an action for the killing of their minor child. *Reilly v. Hannibal &c. Ry. Co.*, 94 Mo. 600 (1887).

New York: Beneficiary not competent; the mother being the sole heir and next of kin of an infant. *Quin v. Moore*, 15 N. Y. 432 (1857).

Ohio: In an action brought by an administrator to recover damages for causing death, it is competent for the defendant to introduce as evidence what the deceased said, while in his right mind, after the injury, tending to show that the injury was caused by his own fault or carelessness. *Helman v. Peoria &c. Ry. Co.*, 58 Ohio St. 400 (1898).

Tennessee: A widow who has brought suit, nominally, in the name of her administrator for the benefit of herself and infant child is a competent witness; the defendant is also a competent witness in his own behalf. *Hale v. Kearly*, 8 Baxt. 49 (1874).

Wisconsin: Beneficiary is competent; suit brought by husband as administrator for the benefit of himself and wife for the death of their son; the wife is a competent witness. *Strong v. City of Stevens Point*, 62 Wis. 255 (1885).

¹⁷ 1 Greenl. on Ev., § 164; *St. Louis &c. Ry. Co. v. Sweet*, 60 Ark. 550 (1895).

under the statute for the death;¹⁸ but not when the testimony of such deceased witness had been given at a coroner's inquest.¹⁹

§ 219. **Verdicts of coroners' or petit juries — Police records.**— Depositions taken at coroners' inquests are not admissible in civil actions for negligence,²⁰ or the verdict of a coroner's jury,²¹ or the verdict of not guilty upon an indictment for homicide,²² or the indictment and conviction of one for the killing of the plaintiff's intestate.²³ Police records of an accident are not admissible in evidence at the trial to recover damages caused by the accident.²⁴

§ 220. **Impeaching witnesses.**— The rule which prohibits a party from impeaching his own witness applies in three cases, to prevent: *First.* The calling of witnesses to impeach the general character of the witness. *Second.* The proof of prior contradictory statements made by him. *Third.* A contradiction of the witness by another, when the only effect is to impeach and not to give any material evidence upon any issue in

¹⁸ Indianapolis &c. R. R. Co. v. Stout, 53 Ind. 143, 158 (1876); Atlanta &c. R. R. Co. v. Venable, 67 Ga. 697 (1881); 1 Greenl. on Ev., § 164. A husband's deposition read in evidence on the prior trial of a like action, brought by the husband and wife, in right of the wife, to recover for the injuries received by the wife, at the same time and for the same cause, the husband having died, and his wife was substituted as administratrix in the husband's suits, was held inadmissible on the ground of not being *identity* of interest, under Pennsylvania Act of May 23, 1887, P. L. 161. Fearn v. West Jersey Ferry Co., 143 Pa. St. 122 (1891).

¹⁹ Jackson v. Crilly, 16 Colo. 103 (1891); Cook v. New York Cent. R. R. Co., 5 Lans. 401 (1871); Erwin v. Neversink SS. Co., 88 N. Y. 184 (1882).

²⁰ Pittsburgh &c. R. R. Co. v. McGrath, 115 Ill. 172 (1885); Petrie v. Columbia &c. R. R. Co., 29 So. Car. 303 (1888).

²¹ State v. Cecil County Commissioners, 54 Md. 426 (1880); Memphis &c. R. R. Co. v. Womack, 84 Ala. 149 (1887); Central R. R. Co. v. Moore, 61 Ga. 151 (1878); Greenl. on Ev., § 56.

²² Marsh v. Walker, 48 Tex. 372 (1877); Cottingham v. Weeks, 54 Ga. 275 (1875); Gray v. McDonald, 104 Mo. 303 (1891). Nor is a judgment in a former trial in favor of another defendant admissible. Thompson v. Chicago &c. Ry. Co., 71 Minn. 89 (1898).

²³ Miller v. Southern Pac. R. R. Co., 20 Or. 285 (1891).

²⁴ Pennsylvania Co. v. McCaffrey, 173 Ill. 169 (1898).

the case.²⁵ A party may contradict his own witness as to a fact material in the case.²⁶

§ 221. **Miscellaneous points — Rules, reports, time-tables of railroad companies.**—By statute in some States it has been enacted that the courts of one State shall take judicial notice of the law of a sister State, as illustrated by the reported cases.²⁷ Matters within the common knowledge of mankind do not require proof.²⁸ Courts do not take judicial notice of city ordinances.²⁹ In cases depending upon the question as to the violence of a storm or the quantity of water that fell, the weather record of the United States signal service is competent evidence.³⁰ The rules of a railroad company are admissible in evidence, though not public rules, but intended for the guidance of its officers and agents only as to what should be done.³¹ So a rule of a railroad company requiring trains to come to a full stop at certain highway crossings, is admissible.³² Time-tables of the defendant company are admissible.³³ The official reports

²⁵ *Becker v. Koch*, 104 N. Y. 394, 74 Ga. 723 (1885); *Cincinnati Street Ry. Co. v. Altmeier*, Ohio St. 401 (1887); *Stark. on Ev.* (9th ed.), p. 248; *Thomas on Neg.*, p. 620; 2 Phil. on Ev., p. 981; 1 *Greenl. on Ev.*, § 442. See *Baltimore City Passenger Ry. Co. v. Knee*, 83 Md. 77 (1896); *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150 (1899).

²⁶ *Coulter v. The American Merchants Union Ex. Co.*, 56 N. Y. 585 (1874); *Becker v. Koch*, 104 id. 394, 403 (1887). But not as to collateral matters. *Saunders v. City & C. R. R. Co.*, 99 Tenn. 130 (1897).

²⁷ *Gen. Stats. of New Jersey*, p. 1401, § 23; *Lower v. Segal*, 30 Vr. 66 (1896).

²⁸ *Illinois Central R. R. Co. v. Greaves*, 75 Miss. 360 (1897).

²⁹ *Illinois Central R. R. Co. v. Ashline*, 171 Ill. 313 (1898).

³⁰ *Evanston v. Gunn*, 99 U. S. 660 (1878).

³¹ *Georgia R. R. Co. v. Williams*, 74 Ga. 723 (1885); *Cincinnati Street Ry. Co. v. Altmeier*, Ohio St. 401 (1887); 6 *Am. Neg. Rep.* 179 (1899). Compliance with private rules not necessarily reasonable care, nor a violation of such rules not necessarily negligence; their violation may, however, be shown. *Smithson v. Chicago & C. Ry. Co.*, 71 Minn. 216 (1898).

³² *Wood v. New York & C. R. R. Co.*, 70 N. Y. 195 (1877).

³³ *Baltimore & C. R. R. Co. v. Chambers*, 81 Md. 371 (1895). The rules promulgated by the board of railroad commissioners governing the management of railroad trains, where railroads cross each other, at grade, are not admissible in evidence, until it is shown that they have been served upon or brought to the knowledge of the company, against which they are offered in evidence. *Chicago & C. R. R. Co. v. Ransom*, 56 Kan. 559 (1896).

of the superintendent of a railroad, to the board of directors are competent evidence, as against the corporation, of the condition of the road.³⁴ Police records of an accident are not admissible in evidence.³⁵ In an action against the proprietors of a stage coach, for an injury caused to a passenger by the misbehavior of one of the horses, evidence of subsequent, similar misbehavior of the horse is admissible, in connection with evidence of his misbehavior at and before the time of the accident, as tending to prove a vicious disposition and fixed habit.³⁶ Evidence that a witness was intoxicated at the time of the occurrence to which he testified, is admissible to discredit his testimony.³⁷

§ 222. **Allegations and proof.**— In actions *ex delicto* it is not always necessary to a recovery by the plaintiff, that he shall prove all the averments of his declaration or complaint. It is sufficient to prove enough of them to show a cause of action.³⁸ Under an averment that the defendant carelessly managed its train, the plaintiff may show a failure to give the proper signals with whistle and bell.³⁹ Variance between the allegations of a declaration and the proof, to be material, must be such as could have misled or operated to the surprise of the defendant.⁴⁰ When a declaration for a personal injury charges a specific act of negligence as the cause of the injury, the precise negligence charged must be proved.⁴¹ There cannot be a recovery upon a ground of negligence not alleged.⁴² An answer or plea of general denial, by the defendant throws upon the plaintiff, the burden of proving every material allegation in the declaration or complaint.⁴³

³⁴ Vicksburg &c. R. R. Co. v. Grant, 11 App. Cas. (D. C.) 107 Putnam, 118 U. S. 545 (1886). (1897).

³⁵ Pennsylvania Co. v. McCaffrey, 173 Ill. 169 (1898).

³⁶ Kennon v. Gilmer, 131 U. S. 22 (1888); Todd v. Inhabitants of Rowley, 8 Allen, 51, 58 (1864).

³⁷ Mace v. Reed, 89 Wis. 440 (1895).

³⁸ Chicago &c. R. R. Co. v. Warner, 108 Ill. 538 (1884).

³⁹ Manley v. Delaware &c. Canal Co., 69 Vt. 101 (1896).

⁴⁰ Washington &c. R. R. Co. v.

⁴¹ Ebsery v. Chicago City Ry. Co., 164 Ill. 518 (1897). Although the petition contains a general charge of negligence, the evidence will be confined to the specific charge. McCarthy v. Rood Hotel Co., 144 Mo. 397 (1898).

⁴² Mitchell v. Prange, 110 Mich. 78 (1896). See Plefka v. Knapp &c. Co., 145 Mo. 316 (1898).

⁴³ Lafayette &c. R. R. Co. v.

Ehman, 30 Ind. 83 (1868). The de-

§ 223. **Relevancy of the evidence.**— At the trial of actions to recover damages for personal injuries caused by negligence, the evidence must be confined to proving facts and circumstances at the time and the place attending the injury; the negligence of the parties then and there; what occurred to others at other times, more or less remote, what were the surrounding circumstances at times other than at the particular occurrence under investigation, are collateral, irrelevant and inadmissible.⁴⁴ When a passenger is injured by a defect in a railroad track, the evidence must be confined to the condition of the track at the time and place of the accident; evidence of the condition of the track elsewhere is, ordinarily, inadmissible.⁴⁵ The motives of the deceased in being upon a railroad track, are immaterial.⁴⁶ The cost of rolling stock of a railroad company, is irrelevant to the question of negligence in running passenger trains at a high rate of speed.⁴⁷

§ 224. **Sufficiency of the evidence — New trial.**— The evidence is not required to be such as to establish beyond a doubt the facts relied upon for a recovery.⁴⁸ If there is *some* evidence to sustain the verdict in every essential particular, it will not be set aside.⁴⁹ Where an accident occurred at a railroad crossing from the alleged neglect or failure by the engineer to ring the bell or blow the whistle, a verdict of a jury in favor of the plaintiff may be supported by mere negative testimony, notwithstanding positive testimony on defendant's part that such warnings were given.⁵⁰ Testimony that the witnesses did not hear

defendant has the right to show that there was no negligence. *Stevens v. Lafayette &c. Gravel Road Co.*, 99 Ind. 392 (1884).

⁴⁴ *Parker v. Portland Publishing Co.*, 69 Me. 173 (1879).

⁴⁵ *Ray on Negligence of Imposed Duties*, § 192; *Grand Rapids &c. R. R. Co. v. Huntley*, 38 Mich. 537 (1878); *Little Rock &c. R. R. Co. v. Eubanks*, 48 Ark. 460 (1886); *Clapp v. Minneapolis &c. R. R. Co.*, 36 Minn. 6 (1886); *Leonard v. Southern Pacific R. R. Co.*, 21 Or. 555 (1892); *Missouri Pacific R. R. Co. v. Mitchell*, 75 Tex. 78 (1889);

Grant v. Raleigh &c. R. R. Co., 108 No. Car. 462 (1891); *Stewart v. Everts*, 76 Wis. 35 (1890).

⁴⁶ *Pennsylvania Co. v. Conlan*, 101 Ill. 93 (1881).

⁴⁷ *Grand Rapids &c. R. R. Co. v. Huntley*, 38 Mich. 537 (1878).

⁴⁸ *Hartung v. Chicago &c. Ry. Co.*, 49 Wis. 358 (1880); *Quaife v. Chicago &c. Ry. Co.*, 48 id. 513 (1880).

⁴⁹ *Kansas Pacific Ry. Co. v. Salmon*, 14 Kan. 512 (1875).

⁵⁰ *Eilert v. Green Bay &c. R. R. Co.*, 48 Wis. 606 (1880).

a signal given by blowing the whistle is not, as a rule, so conclusive as testimony of the same number of witnesses that they did hear it, yet the rule may be greatly modified in a given case, by the character and interest of the witnesses, their means and opportunities of hearing, and other circumstances.⁵¹ Other things being equal, positive testimony is more to be relied upon than negative.⁵² A new trial will not be granted on the ground that the verdict is against the weight of the evidence, unless such verdict is so manifestly against the evidence as to show that the jury adopted some wrong principle in their calculations, or that their minds were not open to reason and conviction, or, in some way, were improperly influenced.⁵³ When there is a total failure of testimony upon a point essential to the plaintiff's

⁵¹ *McKeever v. New York &c. R. R. Co.*, 88 N. Y. 667 (1882). Effect of positive and negative testimony as to ringing a bell or blowing a whistle of a locomotive. See *Bohan v. Milwaukee &c. Ry. Co.*, 61 Wis. 391 (1884); *Longenecker v. Pennsylvania R. R. Co.*, 105 Pa. St. 328 (1884); *Byrne v. New York &c. R. R. Co.*, 14 Hun. 322 (1878); *Renwick v. New York &c. R. R. Co.*, 36 N. Y. 132 (1867); *Culhane v. New York &c. R. R. Co.*, 60 id. 133 (1875); *Urbanek v. Chicago &c. Ry. Co.*, 47 Wis. 59 (1879); *Whittaker v. New York &c. R. R. Co.*, 19 Jones & S. 287 (1885).

⁵² *Crew v. St. Louis &c. Ry. Co.*, 20 Fed. Rep. 87 (1884); *Chicago &c. R. R. Co. v. Robinson*, 106 Ill. 142 (1883); *Hauser v. Central R. R. Co. of N. J.*, 147 Pa. St. 440 (1892). The rule is not applicable to a case where the plaintiff listened for the bell or whistle within hearing distance and did not hear either. *Annaker v. Chicago &c. Ry. Co.*, 81 Iowa, 267 (1890).

⁵³ *Daley v. Norwich &c. R. R. Co.*, 26 Conn. 591 (1858). *Johnson, J.* "A new trial, asked on the ground that the verdict is con-

trary to the evidence, ought to be granted only in a case of plain deviation from right and justice, and not in a *doubtful* case, merely because the court, if on the jury, would have given a different verdict. Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the evidence or the facts proven. Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the verdict, and the restriction applies *a fortiori* to an appellate court." *Sheff v. City of Huntington*, 16 W. Va. 325 (1880). To the same effect is *Blosser v. Harshbarger*, 21 Gratt. 214 (1871).

recovery, a verdict in his favor will be set aside by the court.⁵⁴ or when the verdict is manifestly against the clear weight of the evidence.⁵⁵ The weight or legal sufficiency of the evidence does not depend upon, nor is it made up of, numbers of witnesses, but of the matter sworn to; the position of the witnesses, their capacity, opportunities to see and hear, as the case may be, their interest and willingness to testify, these are all elements to be taken into consideration in weighing testimony and in determining its legal sufficiency.⁵⁶

⁵⁴ Union Pacific Ry. Co. v. Milliken, 8 Kan. 647 (1871); Kelly v. R. &c. Co. v. Kenney, 58 Ga. 485 (1877); Nolan v. Shickle, 3 Mo. App. Detroit Bridge Works, 17 id. 558 300 (1877).

⁵⁶ Chicago &c. R. R. Co. v. Mc-

⁵⁵ Columbus &c. Ry. Co. v. Kean, 40 Ill. 218 (1866). Froesch, 57 Ill. (1870); Central R.

CHAPTER VIII.

DAMAGES FOR PERSONAL INJURIES.

- § 225. Damages and evidence germane — Three classes of cases.
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- 248. Interest.
- 249. Reduction of verdict by the court.
- 250. Verdict may be set aside if damages awarded are inadequate.
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§ 225. Damages and evidence germane—Three classes of cases. — The rules of law under which damages are assessed are germane to the law of evidence. The damages allowed the plaintiff are the result of such evidence, as the courts hold, is competent and sufficient to be considered by the jury for the wrong done to

the plaintiff. At the trial of actions to recover damages for personal injury, or for causing the death of a human being by negligence, the elements of damage are not the same in all cases. They are in the various classes of cases computed on widely differing principles. For convenience in assessing damages, such cases may be grouped into three general classes. *First.* When the action is brought to recover damages for a direct injury to the person of the plaintiff, whether such plaintiff is male or female, married or single, adult or minor. *Second.* When the action is brought to recover damages for a loss resulting indirectly from the direct injury to the person — the plaintiff standing in a legal relation to the person directly injured, such as husband and wife, parent and child, master and servant. *Third.* When the plaintiff in the action sues in a representative capacity for causing the death of a human being.

§ 226. **Damages and injury distinguished.**— There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word “injury” denotes the illegal act; the term “damages” means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are, in strictness, words of widely different meaning. There is more than a mere verbal difference in their meaning, for they describe essentially different things. In every valid cause of action two elements must be present — the injury and the damages. The one is the legal wrong which is to be redressed, the other the scale or measure of the recovery. As there may be damages without an injury, so there may be an injury without damages.¹

§ 227. **There can be but one recovery for an injury from a single wrong.**— Fresh damages, without a fresh injury, will not

¹ Elliott, J., in *City of North Vernon v. Voegler*, 103 Ind. 314, 319 (1885); Mayne on Dam. 1; 1 Suth. on Dam. 79. Damages are the pecuniary recompense for an injury. Abb. Law Dict., “A synonym of damage is ‘loss.’ Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. Damage signifies the thing taken away.” *Fay v. Parker*, 53 N. H. 342 (1872).

authorize a second or subsequent action.² The rule is, A fresh action cannot be brought unless there be both a new, unlawful act and fresh damages.³ The person injured can recover but one compensation for all damages, past and prospective, including expenses incurred, loss of time, and for actual suffering of body and mind.⁴ This rule was applied so that a recovery, in an action brought by a father for damages sustained by himself in consequence of personal injuries to his son, will be a bar to a second action by the father to recover damages sustained in consequence of the same injury, notwithstanding the recovery in the first action was limited to damages which accrued prior to the commencement of the first suit, and the second action was brought expressly to recover loss of service and other damages sustained subsequent to that time.⁵

§ 228. **Damages as the natural and proximate effect — Burden of proof** — In an action of tort, the rule of damages is broader than in actions brought for a breach of contract.⁶ The dam-

² *City of North Vernon v. Voeger*, 103 Ind. 314, 319 (1885); *Brooks v. Rochester Ry. Co.*, 156 N. Y. 244 (1898).

³ *Warner v. Bacon*, 8 Gray, 397, 405 (1857); *Mayne on Dam.* 611; 1 *Suth. on Dam.* 175, 197; *Freem. on Judg.*, § 241; *Fetter v. Beale*, 1 Salk. 11; 1 *Ld. Raym.* 339; *Hodsoll v. Stallebrass*, 11 Ad. & E. 301 (1840); *Town of Elkhart v. Ritter*, 66 Ind. 136, 141 (1879); *Weisenberg v. City of Appleton*, 26 Wis. 56 (1870); *Whitney v. Town of Clarendon*, 18 Vt. 252 (1846); *Perry v. Dickerson*, 85 N. Y. 345 (1881); *Filer v. New York &c. R. R. Co.*, 49 id. 42 (1872).

⁴ *Wallace v. Wilmington &c. R. R. Co.*, 8 Houst. 529 (1889, Del.).

⁵ *Whitney v. Town of Clarendon*, 18 Vt. 252 (1846); *Hodsoll v. Stallebrass*, 11 Ad. & E. 301 (1840). But an action by the father to recover damages for the death of his minor child, caused by the negligence of another, is statutory, and cannot be joined with an action by him to

recover for personal injuries received by himself, though caused by the same negligent act. *Cincinnati &c. R. R. Co. v. Chester*, 57 Ind. 297 (1877). An injury to the plaintiff's person and to his clothing furnishes but one cause of action. *Bliss v. New York &c. R. R. Co.*, 160 Mass. 447, 455 (1894). So a personal injury and damage to plaintiff's carriage, at the same time and from the same cause gives rise to but one cause of action, and a recovery in an action for damages to one will bar a subsequent action for damages to the other. *Reilly v. Sicilian Asphalt Paving Co.*, 4 Am. Neg. Rep. 692; App. Div. (1898). See *Chicago &c. Ry. Co. v. Ingraham*, 131 Ill. 659 (1890). *Contra*, *Brunsdon v. Humphrey*, L. R., 14 Q. B. D. 141 (1884), reversing 11 id. 712.

⁶ *Brown v. Chicago &c. Ry. Co.*, 54 Wis. 342 (1882); *Ehrgott v. Mayor &c. of New York*, 96 N. Y. 264, 281 (1884). See § 2, n.

ages include everything of which the plaintiff has been deprived as a proximate and natural consequence of the injury.⁷ They are not, generally speaking, susceptible of a strictly mathematical calculation.⁸ The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things. The term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss.⁹ The Supreme Judicial Court of Massachusetts said: "It is well settled in Massachusetts that one who violates a duty owed to others, or commits a tortious or wrongfully negligent act, is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to, and in fact do, result from his act."¹⁰ The burden of proof rests upon the plaintiff to prove the damages claimed.¹¹ When the elements of damage are not capable of precise proof, in some cases, it is said that doubts are to be resolved in favor of the injured person.¹² When a plaintiff alleges that his person has been injured and proves the allega-

⁷ Generally on the subject of damages, see Elliott on Roads & Streets, 653; Suth. on Dam. 527; Mayne on Dam. 1.

⁸ City of Denver v. Sherret, 88 Fed. Rep. 226, 236 (1898).

⁹ Dixon, J., in Wiley v. West Jersey R. R. Co., 15 Vr. 247, 251 (1882); Newark &c. R. R. Co. v. McCann, 29 id. 642, 644 (1896). Proximate damages are such as are the ordinary and natural results of the defendant's negligent acts of commission or omission, and are such as might reasonably be anticipated would flow therefrom. The law regards only the direct and proximate result of the negligent acts of a party creating liability against him. Braun v. Craven, 175 Ill. 401 (1898). See Jucker v. Chicago &c. Ry. Co., 52

Wis. 150 (1881); Phillips v. Dickerson, 85 Ill. 11 (1877); Fowlkes v. Southern Ry. Co., 96 Va. 742 (1899).

¹⁰ Smethurst v. Boston Square Church, 148 Mass. 261 (1889); Ehrgott v. Mayor &c. of New York, 96 N. Y. 264, 281 (1884); Fowlkes v. Southern Ry. Co., 96 Va. 742 (1899). In a charge in which the trial judge used the expressions "likely to experience," "and is likely to sustain during the remainder of his life;" it was held that the measure of damages was correctly stated. Scott Township v. Montgomery, 95 Pa. St. 444 (1880).

¹¹ Leeds v. Metropolitan Gas Light Co., 90 N. Y. 26, 29 (1882).

¹² Ehrgott v. Mayor &c. of New York, 96 N. Y. 264 (1884).

tion, the law implies damages. He may recover such as necessarily and immediately flow from the injury, which are called general damages, under a general allegation that damages were sustained.¹³ Direct proof of any specific, pecuniary loss is not indispensable to a recovery.¹⁴

§ 229. **The rule of recovery is compensation — Three principal items.**— The principle which may be said to be common to all these classes of cases in estimating damages, and which is recognized by all the cases, is, that damages are given or assessed as *compensation*¹⁵ for the loss and injury sustained. The rule of recovery is compensation, as distinguished from what is called in the books *punitive* damages or *smart* money, or as a *solatium* for injured feelings, in cases resulting in death. In aggravated cases, such as willful negligence, which will be noted in section 243; *punitive* damages or *smart* money may be awarded against the defendant to deter the wrongdoer from repeating the wrong. In some States this is expressly permitted by statute. Damages for a personal injury consist of three principal items: *First*. The expenses to which the injured person is subjected by reason of the injury complained of. *Second*. The inconvenience and suffering naturally resulting from it. *Third*. The loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury.¹⁶ There is no standard by which permanent injuries to the person can be valued, nor can there be any direct evidence of the amount

¹³ *Gumb v. Twenty-third Street Ry. Co.*, 114 N. Y. 411, 414 (1889). So when there is no special allegation of permanent injuries. *Tyler v. Third Ave. R. R. Co.*, 41 N. Y. Supp. 523 (1896).

¹⁴ *Fisher v. Jansen*, 128 Ill. 549 (1889).

¹⁵ *Elliott on Roads & Streets*, 652; 8 Am. & Eng. Ency. of Law (2d ed.), p. 537; *Leeds v. Metropolitan Gas Light Co.*, 90 N. Y. 26 (1882); *Smedley v. Hestonville &c. Ry. Co.*, 184 Pa. St. 620 (1898); *Barbour County v. Horn*, 48 Ala. 566 (1872). The word "compensation," in the phrase "compensa-

tion for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for, or made because of, the suffering consequent upon the injury. *Williams, J.*, in *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1, 15 (1896). Compensatory damages are such as measure the actual loss and are given as amends therefor. *Talbott v. West Virginia &c. Ry. Co.*, 42 W. Va. 560 (1896). ¹⁶ *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1, 14 (1896); *Smedley v. Hestonville &c. Ry. Co.*, 184 id. 620 (1898).

of money which will compensate for them. But it is sufficient to show the jury the extent of the injuries, and the amount of their verdict is to be determined by an intelligent discretion. The amount will not be disturbed, unless it is so excessive as to indicate passion or prejudice.¹⁷

§ 230. **Medical expenses — Nursing — Gratuitous services.**—

Necessary medical and other expenses incurred by the plaintiff in effecting a cure are elements of damage. The value of such expenses should be shown by the plaintiff. All the cases hold that it is competent for the plaintiff to show, by evidence, the value of the expenses incurred, such as expenses for medical services, medicines and nursing.¹⁸ To recover for such services, some of the cases hold that the plaintiff must show, by evidence, either that he has paid for the services or is liable therefor.¹⁹ There can be no recovery for services rendered gratuitously.²⁰ Other cases hold that there may be a recovery for the value of the services, even though rendered gratuitously.²¹ Testimony in plaintiff's behalf, of expenditures incurred by him in trips made to healing springs and wells in aid of recovery from such

¹⁷ *Clare v. Sacramento Electric &c. Co.*, 122 Cal. 504 (1898).

¹⁸ *Chicago &c. R. R. Co. v. Wilson*, 63 Ill. 167 (1872); *Klein v. Thompson*, 19 Ohio St. 569 (1869); *Vicksburg &c. R. R. Co. v. Putnam*, 118 U. S. 545 (1886); *Goodno v. City of Oshkosh*, 28 Wis. 300 (1871); *Folsom v. Town of Underhill*, 36 Vt. 580 (1864); *Scott Township v. Montgomery*, 95 Pa. St. 444 (1880); *Morris v. Chicago &c. R. R. Co.*, 45 Iowa, 29 (1876); *Huizega v. Outler Lumber Co.*, 51 Mich. 278 (1883); *Central Passenger Ry. Co. v. Kuhn*, 86 Ky. 578 (1888); *Ramsom v. New York &c. R. R. Co.*, 15 N. Y. 415 (1857); *Whelan v. New York &c. R. R. Co.*, 38 Fed. Rep. 15 (1889).

¹⁹ *Morris v. Grand Avenue Ry. Co.*, 144 Mo. 500 (1898). That he cannot recover for a loss he has

never sustained, nor for money which he is not legally liable to pay. *Duke v. Missouri Ry. Co.*, 99 Mo. 347 (1889); *Drinkwater v. Dinsmore*, 80 N. Y. 390 (1890).

²⁰ *Drinkwater v. Dinsmore*, 80 N. Y. 390, 393 (1880). It was said, "the defendant may show that the plaintiff was doctored at a charity hospital, or at the expense of the town or county, or gratuitously. In such case, the doctor's bill could not be an element of his damage." Paid by the brother of the plaintiff. See *Peppercorn v. City of Black River Falls*, 89 Wis. 38 (1894).

²¹ *City of Indianapolis v. Gaston*, 58 Ind. 224, 227 (1877); *Pennsylvania Co. v. Marion*, 104 id. 239, 244 (1885); *Klein v. Thompson*, 19 Ohio St. 569 (1869). See *Metcalf v. Baker*, 57 N. Y. 662 (1874).

injury, is competent — the necessity and reasonableness of such expenditures to be passed upon by the jury as a question of fact.²² “Nursing and medical attendance” include all expenses which, as shown by the evidence, plaintiff incurred in procuring medical assistance and medicines.²³ The expenses, for which a plaintiff may recover must be such as have been actually paid, or such as in the judgment of the jury are reasonably necessary to be incurred.²⁴ The plaintiff may procure a trained nurse, or other competent person, to take care of him, and recover the cost thereof as a portion of the damages.²⁵ The value of the medical attendance and medicines must be established by evidence.²⁶ When the fact that nursing was done has been proved, the value of such services may be included in the award of damages, without proof of their value.²⁷ The liability of a defendant for the plaintiff’s doctors’ and nurses’ bills rests upon the ground, that they were rendered necessary by the

²² *Hart v. Charlotte &c. R. R.* Council Bluffs, 52 Iowa, 698 (1879); *Co.*, 33 So. Car. 427 (1890). The plaintiff is entitled to recover as a part of the damages, reasonable and necessary outlays in an attempt to be cured of the injuries resulting from the negligence of the defendant. *Sherwood v. Chicago &c. Ry. Co.*, 82 Mich. 374 (1890).

²³ *Knapp v. Sioux City &c. Ry. Co.*, 71 Iowa, 41 (1887). ²⁵ *Kendall v. City of Albia*, 73 Iowa, 241 (1887). And evidence that he had a wife and a grown son and daughter, who could have given him necessary care and attention without expenses, is not admissible. *Ib.* A person who, as the result of an injury, is compelled to employ a servant to do her household work is entitled to damages for the expense of keeping such servant. *Willis v. Second Avenue Traction Co.*, 189 Pa. St. 430 (1899).

²⁴ *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 14 (1896). The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants; the value of such services may be shown though furnished gratuitously. See *Varnham v. City of Council Bluffs*, 52 Iowa, 698 (1879); *Hewitt v. Eisenbart*, 36 Neb. 794 (1893). Not necessary that they have been actually paid. *Wilson v. Southern Pacific Co.*, 13 Utah, 352 (1896); *Varnham v. City of*

²⁶ *Reed v. Chicago &c. Ry. Co.*, 57 Iowa, 23 (1881); *Eckerd v. Chicago &c. Ry. Co.*, 70 id. 23 (1886); *Duke v. Missouri Pacific Ry. Co.*, 99 Mo. 347 (1889); *Smith v. Chicago &c. R. R. Co.*, 108 id. 243 (1891).

²⁷ *Murray v. Missouri Pacific Ry. Co.*, 101 Mo. 236 (1890).

defendant's neglect of duty, and it is not altered, by any arrangement the plaintiff may have made for the payment of such bills, or whether he ever pays them.²⁸ A wife cannot recover expenses, such as physicians' or nurses' bills, for which her husband is liable,²⁹ unless she has charged her separate estate therefor.³⁰ She may treat them as her own debt and pay them, in which case she can recover such expenses.³¹

§ 231. **Physical and mental pain — Fright — Miscarriage — Question for the jury.**— All the cases hold that, when the action is brought to recover damages for direct injuries to the person of the plaintiff, the physical and mental pain which the plaintiff has suffered, as a natural result of the injuries, are proper elements of compensation,³² that which it is *reasonably certain* the plaintiff will suffer in the future.³³ Pain is proved by proof of mangling and crushing.³⁴ Pain and suffering are not capable of being exactly measured by an equivalent in money.³⁵ For pain and suffering there can be no measure of compensa-

²⁸ *Denver &c. R. R. Co. v. Lortzen*, 79 Fed. Rep. 291 (1897).

²⁹ *Relyea v. Minneapolis &c. Ry. Co.*, 61 Minn. 224 (1895); *Moody v. Osgood*, 50 Barb. 628 (1868).

³⁰ *Moody v. Osgood*, 50 Barb. 628 (1868).

³¹ *Atlantic &c. R. R. Co. v. Ironmonger*, 95 Va. 625 (1898); *City of Columbus v. Strasser*, 138 Ind. 301 (1894); *Lucas v. Detroit R. R. Co.*, 92 Mich. 412 (1892).

³² *Village of Sheridan v. Hibbard*, 119 Ill. 307 (1887); *McLaughlin v. City of Corry*, 77 Pa. St. 109 (1874); *Pennsylvania &c. Canal Co. v. Graham*, 63 id. 290 (1869); *Scott Township v. Montgomery*, 95 id. 444 (1880); *Kennon v. Gilmer*, 131 U. S. 22 (1888); *Mason v. Inhabitants of Ellsworth*, 32 Me. 271 (1850); *Hammond v. Town of Mukwa*, 40 Wis. 35 (1876); *City of Indianapolis v. Gaston*, 58 Ind. 224 (1877); *Klein v. Jewett*, 11 C. E.

Gr. 474 (1875, N. J.); *Wilson v. Pennsylvania R. R. Co.*, 132 Pa. St. 27 (1890); *Louisville &c. R. R. Co. v. Binion*, 107 Ala. 645 (1894); *Ransom v. New York &c. R. R. Co.*, 15 N. Y. 415 (1857); *Central Passenger Ry. Co. v. Kuhn*, 86 Ky. 578 (1888); *District of Columbia v. Woodbury*, 136 U. S. 450 (1889).

³³ *Ayres v. Delaware &c. R. R. Co.*, 158 N. Y. 254 (1899); *Holyoke v. Grand Trunk Ry. Co.*, 48 N. H. 541 (1869); *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 42 (1872); *Memphis &c. R. R. Co. v. Whitfield*, 44 Miss. 466 (1870); *Frink v. Schroyer*, 18 Ill. 416 (1857); *Fry v. Dubuque &c. Ry. Co.*, 45 Iowa, 416 (1877); *Swift v. Raleigh*, 54 Ill. App. 44 (1894); *Meeteer v. Manhattan Ry. Co.*, 63 Hun, 533 (1892).

³⁴ *Chicago &c. R. R. Co. v. Warner*, 108 Ill. 538 (1884).

³⁵ *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 14 (1896).

tion, save the arbitrary judgment of a jury. This is a rule of necessity.³⁶ The mental suffering must be that which accompanies actual injury.³⁷ The action being for personal injuries, there can be no recovery for mental suffering, accompanied by no other injury.³⁸ In Connecticut it was held that the jury have a right to consider the peril and danger to which the person of the plaintiff was exposed, by the accident producing the injury.³⁹ Where there is actual physical injury, damages resulting from incidental fright may be recovered.⁴⁰ Although mental suffering alone will not support an action for damages, yet it constitutes an aggravation of damages when it naturally ensues from the act complained of.⁴¹ A shock or injury to the nervous system, occasioned by a tort, must be regarded as a physical injury producing suffering to the body rather than to the mind, although the mind may be at the same time injuriously affected.⁴² There may be a recovery for a miscarriage resulting from fright.⁴³ Any physical or mental suffering at-

³⁶ *Leeds v. Metropolitan Gas Light Co.*, 90 N. Y. 26, 29 (1882).

³⁷ *Smith v. Pittsburgh &c. Ry. Co.*, 2 Ohio St. 10 (1872); *Ferguson v. Davis County*, 57 Iowa, 601 (1881); *Smith v. Holcomb*, 99 Mass. 552 (1868); *McMahon v. Northern Central Ry. Co.*, 39 Md. 438 (1873); *Porter v. Hannibal &c. R. R. Co.*, 71 Mo. 66 (1879); *Memphis &c. R. R. Co. v. Whitfield*, 44 Miss. 466 (1870); *Kennon v. Gilmer*, 131 U. S. 22 (1888); *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668 (1896).

³⁸ *Canning v. Inhabitants of Williamstown*, 1 Cush. 451 (1848); *Indianapolis &c. R. R. Co. v. Stables*, 62 Ill. 313 (1872); *Johnson v. Wells &c. Co.*, 6 Nev. 224 (1870); *Wyman v. Leavitt*, 71 Me. 227 (1880); *Fitzpatrick v. Great Western Ry. Co.*, 12 Up. C. Q. B. 645 (1855); *Consolidated Traction Co. v. Lambertson*, 30 Vr. 297 (1896). Such as fright. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107 (1896); *Buchanan*

v. New Jersey R. R. Co., 23 Vr. 265 (1890). Fright or terror unaccompanied by physical injury, even though a nervous shock and subsequent illness result. *Braun v. Craven*, 175 Ill. 401 (1898).

³⁹ *Seger v. Town of Barkhamsted*, 22 Conn. 290 (1853); *Masters v. Town of Warren*, 27 id. 293 (1858).

⁴⁰ *Consolidated Traction Co. v. Lambertson*, 30 Vr. 297 (1896); *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134 (1892); *Mack v. South Bound R. R. Co.*, 52 So. Car. 323 (1897).

⁴¹ *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668 (1896).

⁴² *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668 (1896).

⁴³ *Oliver v. Town of La Valle*, 36 Wis. 592 (1875); *Brown v. Chicago &c. Ry. Co.*, 54 Wis. 342 (1882); *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134 (1892); *Chicago &c. Ry. Co. v. Hunerberger*, 16 Ill.

tending the miscarriage is a proper element of compensation.⁴⁴ The amount of such compensation as damages must be left to the fair discretion and judgment of the jury.⁴⁵ But a determination of damages cannot be left to the mere caprice of the jury. The jury must be limited to compensatory damages.⁴⁶

§ 232. **Loss of physical and mental capacity — Earnings — Profits.**— The plaintiff's loss of capacity, physical and mental, to attend to his usual business or perform the kind of labor for which he is fitted, are elements of compensation.⁴⁷ The damages must cover present loss and that which may arise from

App. 387 (1885). *Contra*, Fitzpatrick v. Great Western R. R. Co., 12 Up. C. Q. B. 645 (1855). "Any damage arising from the injury and resulting in depriving the plaintiff of prospective offspring." Such a charge was held error, action by the husband. *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417 (1894). See *Mitchell v. Rochester Ry. Co.*, 151 id. 107 (1896).

⁴⁴ *Bovee v. Town of Danville*, 53 Vt. 183 (1880). But the rule goes no further. Any injured "feelings" following the miscarriage, not part of the pain naturally attending it, are too remote to be considered elements of damage. *Ib.* There can be no recovery for the death of the child and its premature birth as a result of the injuries. *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592 (1892); *Tunncliffe v. Bay City Cons. Ry. Co.*, 102 Mich. 624 (1894); *Thomas v. Gates*, Cal. ; 58 Pac. Rep. 315 (1899).

⁴⁵ *Ward v. Blackwood*, 48 Ark. 396 (1886); *New Jersey Express Co. v. Nichols*, 4 Vr. 434 (1867); *Morris v. Chicago &c. R. R. Co.*, 45 Iowa, 29 (1876); *Howard Oil Co. v. Davis*, 76 Tex. 630 (1890); *Johnson v. Wells &c. Co.*, 6 Nev. 224

(1870); *Montgomery &c. Ry. Co. v. Mallette*, 92 Ala. 209 (1890); *Richmond &c. R. R. Co. v. Allison*, 86 Ga. 145 (1890). To the experience and good sense of the jurors. *Walker v. Erie Ry. Co.*, 63 Barb. 260 (1872). To the judgment and common sense of the ordinary juror. *Brunswick v. White*, 70 Tex. 504 (1888). Damages to a large extent rest in the discretion of the jury. *Chicago &c. R. R. Co. v. Warner*, 108 Ill. 538 (1884); *Springfield Consolidated Ry. Co. v. Hoeffner*, 175 id. 634 (1898).

⁴⁶ *Heil v. Glanding*, 42 Pa. St. 493 (1862); *Collins v. Leafey*, 124 id. 203 (1889).

⁴⁷ *New Jersey Express Co. v. Nichols*, 4 Vr. 433 (1867); *McLaughlin v. City of Corry*, 77 Pa. St. 109 (1874); *Goodhart v. Pennsylvania R. R. Co.*, 177 id. 1 (1896); *George v. City of Haverhill*, 110 Mass. 506 (1872); *City of Chicago v. Jones*, 66 Ill. 349 (1872); *Hall v. City of Fond du Lac*, 42 Wis. 274 (1877); *Morris v. Chicago &c. R. R. Co.*, 45 Iowa, 29 (1876); *Fisher v. Jansen*, 128 Ill. 549 (1889); *District of Columbia v. Woodbury*, 136 U. S. 450 (1889); *Haden v. Sioux City &c. Ry. Co.*, 92 Iowa, 226 (1894).

future incapacity.⁴⁸ Evidence of the nature and extent of the plaintiff's business and the general rate of profit he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of its furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury, to guide them in the exercise of that discretion which, to a certain extent, is always vested in the jury.⁴⁹ It is competent for the plaintiff to show, by evidence, his previous physical condition and ability to labor, or to follow his usual avocation, as well as his condition since the injury.⁵⁰ The permanent nature of the injury, its effect upon his capacity as a physician to pursue his professional calling, resulting from the injury;⁵¹ or that a physician had no other means of support.⁵² The plaintiff may introduce evidence to show the kind and amount of mental and physical labor which he had been accustomed to do, before receiving the injury, as compared with that which he has been able to do since, for the purpose of aiding the jury to determine what compensation he should receive for his loss of mental and physical capacity.⁵³ The jury, in estimating damages, is to consider the health and condition of the plaintiff before the injury complained of, as compared with his health and condition consequent upon the injury. Whether it is, in its nature, permanent, and how far it is calculated to disable the plaintiff from engaging in those mechanical pursuits and employments for

⁴⁸ Klein v. Jewett, 11 C. E. Gr. 474 (1875).

⁴⁹ New Jersey Express Co. v. Nichols, 4 Vr. 433, 437 (1867); Bierbach v. Goodyear Rubber Co., 54 Wis. 208 (1882); Hanover R. R. Co. v. Coyle, 55 Pa. St. 396 (1867).
⁵⁰ City of Joliet v. Conway, 119 Ill. 489 (1887); Ehrgott v. Mayor &c. New York, 96 N. Y. 264 (1884); Richmond &c. R. R. Co. v. Allison, 86 Ga. 145 (1890).

⁵¹ City of Indianapolis v. Gaston, 58 Ind. 224 (1877). See Metcalf v. Baker, 57 N. Y. 662 (1874).

⁵² Stafford v. City of Oskaloosa, 64 Iowa, 251 (1884).

⁵³ Ballou v. Farnum, 11 Allen, 73 (1865). Evidence that the plaintiff could read and was studying medicine and going to school before the injury, but could not read after the occurrence, is admissible. Bruce v. Beall, 99 Tenn. 303 (1897). Damages for nursing wife and doing her work, the value of a competent servant to perform same duty and not wages such as husband would have earned at his trade. Hazard Powder Co. v. Volger, 58 Fed. Rep. 152 (1893); Town of Salida v. McKinna, 16 Colo. 523 (1891).

which, in the absence of such injury, he would have been qualified.⁵⁴ The plaintiff may show how much he had been earning and was capable of earning, by testifying to the amount of his annual earnings for six or seven years prior to the accident.⁵⁵ The extent of a physician's practice may be shown;⁵⁶ or that the plaintiff was engaged in a particular business, such as a distiller and manufacturer of turpentine.⁵⁷ Where the business is of such a nature that the profits therein are uncertain, proof of plaintiff's past profits is incompetent, such as the uncertain future profits of commercial business, or the amount of past profits derived therefrom.⁵⁸ Or where earnings depend upon skill and capital combined, it has been held error to allow proof of them.⁵⁹ The loss of profits in conducting a business involving the labor of others, arising from the suspension of the business by reason of personal injury to the owner, is not a necessary consequence of such injury, the extent of recovery being what his services were worth in conducting the business.⁶⁰

⁵⁴ *McMahon v. Northern Central Ry. Co.*, 39 Md. 438 (1873); *Waterman v. Chicago &c. R. R. Co.*, 82 Wis. 613 (1892); *Consolidated Coal Co. v. Haenni*, 146 Ill. 614 (1893). In ascertaining the damages for impaired ability to earn a livelihood, standard life and annuity tables are competent evidence to be considered. *Whelan v. New York &c. R. R. Co.*, 38 Fed. Rep. 15 (1889). But not absolute guides to control their decision. *Vicksburg &c. R. R. Co. v. Putnam*, 118 U. S. 545 (1886).

⁵⁵ *Ehrgott v. Mayor &c. New York*, 96 N. Y. 264, 275 (1884). That was the case of a book canvasser, and the court illustrated the principle by citing the case of a lawyer, physician and dentist. So in the case of a peddler, evidence of the annual amount of his sales and the profits he made from them was held competent. *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396 (1867).

⁵⁶ *Nebraska City v. Campbell*, 2 Black, 590 (1862, U. S.); *Cleveland &c. Ry. Co. v. Gray*, 148 Ind. 266 (1897).

⁵⁷ *Wade v. Leroy*, 20 How. 34 (1857, U. S.).

⁵⁸ *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391 (1874). The plaintiff in that case was a tea merchant. In a Wisconsin case it was held error to admit proof of the average profits of plaintiff's business while he carried it on, as a basis of estimating his damages, such a basis being of too uncertain and speculative a character. *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208 (1882).

⁵⁹ *Johnson v. Manhattan Ry. Co.*, 52 Hun, 111 (1889).

⁶⁰ *Silsby v. Michigan Car Co.*, 95 Mich. 204 (1893). Amount of profits which a theatrical troupe expected to realize too remote. *Southern Ry. Co. v. Myers*, 87 Fed. Rep. 149 (1898).

Nor profits plaintiff would have made by superintending the sales of property which he was unwilling to entrust to others.⁶¹

§ 233. Earnings of plaintiff cannot be capitalized by the jury.

— The jury cannot capitalize the earnings of the plaintiff and give him a sum, the interest of which would be equal to what his earnings had been in previous years.⁶² Nor can the damages be determined by the number of years that the disability will continue to exist, multiplied by the yearly compensation the plaintiff has earned in the past.⁶³

§ 234. Loss of time — Past and future.— All the cases hold that the loss of time from business is an element of compensation in the award of damages.⁶⁴ The value of the time lost must be proved.⁶⁵ When the plaintiff had been employed at a salary and his employer continues to pay his salary during the time that he is disabled, loss of time is not an element of compensation.⁶⁶

⁶¹ *Phyfe v. Manhattan Ry. Co.*, 30 Hun, 377 (1883). Profits derived from an investment or the management of a business enterprise are not earnings. The word "earnings" means the fruit or reward of labor, the price of services performed. Profits represent the net gain made from an investment or from the prosecution of some business after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. *Williams, J.*, in *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1, 15 (1896).
⁶² *Gregory v. New York & C. R. Co.*, 55 Hun, 303, 308 (1890). The plaintiff is entitled only to their *present* worth. *Kinney v. Tolkerts*, 84 Mich. 616, 624 (1891); *Baker v. Metropolitan R. R. Co.*, 177 Pa. St. 1, 17 (1896).
⁶³ *City of Denver v. Sherret*, 88 Fed. Rep. 226, 236 (1898).
⁶⁴ *Huizega v. Cutler & C. Lumber Co.*, 51 Mich. 272 (1883); *Morris v. Chicago & C. R. R. Co.*, 45 Iowa, 29 (1876); *Houston & C. Ry. Co. v. Boehm*, 57 Tex. 152 (1882); *Nones v. Northouse*, 45 Vt. 587 (1874); *Tomlinson v. Town of Derby*, 43 Conn. 562 (1876); *City of Indianapolis v. Gaston*, 58 Ind. 224 (1877); *City of Chicago v. Jones*, 66 Ill. 349 (1872); *City of Ripon v. Bittel*, 30 Wis. 614 (1872); *Pennsylvania & C. R. R. Co. v. Graham*, 63 Pa. St. 290 (1869); *Tefft v. Wilcox*, 6 Kan. 46 (1870); *Leeds v. Metropolitan Gas Light Co.*, 90 N. Y. 26 (1882); *Chicago & C. R. R. Co. v. Starmer*, 26 Neb. 630 (1889).
⁶⁵ *Leeds v. Metropolitan Gas Light Co.*, 90 N. Y. 26 (1882); *118 id.* 533 (1890).
⁶⁶ *Drinkwater v. Dinsmore*, 80 N.

§ 235. **Prospective or future damages.**— Where the injury is permanent, the plaintiff may recover *prospective* as well as past damages.⁶⁷ To enable a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a *reasonable certainty* that they will result from the original injury.⁶⁸ The limit in respect to future damages is, that they must be such as it is *reasonably certain* will inevitably and necessarily result from the injury.⁶⁹ That they are likely to so develop is insufficient,⁷⁰ or a mere possible continuance of disability by reason of an injury is not a proper element of damages,⁷¹ or

- Y. 390 (1880); *Montgomery &c. Ry. Co. v. Mallette*, 92 Ala. 209 (1890). ⁶⁷ *Hodsoll v. Stallebrass*, 11 Ad. & E. 301 (1840); *Weisenberg v. City of Appleton*, 26 Wis. 56 (1870); *Whitney v. Town of Clarendon*, 18 Vt. 252 (1846); *Wallace v. Western R. R. Co.*, 104 No. Car. 442 (1889); *Gorham v. Kansas City &c. Ry. Co.*, 113 Mo. 408 (1892); *Lake Shore &c. Ry. Co. v. Johnsen*, 135 Ill. 641, 654 (1891).
 and for the pain and suffering, ⁶⁸ *Strohm v. New York &c. R. R. Co.*, 96 N. Y. 305, 306 (1884); followed, *Tozer v. New York &c. R. R. Co.*, 105 id. 617 (1887); *Ayres v. Delaware &c. R. R. Co.*, 158 id. 254 (1899).
 and mental anxiety which it was ⁶⁹ *Filer v. New York &c. R. R. Co.*, 49 N. Y. 42, 49 (1872); *Feeney v. Long Island R. R. Co.*, 116 id. 375 (1889); *Washington &c. R. R. Co. v. Harmon*, 147 U. S. 571 (1892); *Waterman v. Chicago &c. R. R. Co.*, 82 Wis. 613, 635 (1892); *Propson v. Leatham*, 80 id. 608, 615 (1891); *White v. Milwaukee &c. Ry. Co.*, 61 id. 536, 541 (1884); *Woodward v. City of Boscobel*, 84 id. 226 (1893); *Chilton v. City of St. Joseph*, 143 Mo. 192 (1897).
 the rule of damages, approved by ⁷⁰ *Strohm v. New York &c. R. R. Co.*, 96 N. Y. 305, 306 (1884).
 see *Sherwood v. Chicago &c. Ry. Co.*, 82 Mich. 374, 383 (1890). ⁷¹ *White v. Milwaukee &c. Ry. Co.*, 61 Wis. 536, 541 (1884).

"may endure hereafter," or "likely to suffer hereafter."⁷² The prospective disablement may be inferred from the nature of the injury, or proved by the opinions of experts.⁷³ There can be no award of damages for future pecuniary loss, unless there is evidence given as to the circumstances and condition in life of the plaintiff, his earning power, skill and capacity.⁷⁴

§ 236. **Injury aggravated by disease — Disease developed by injury.**—The fact that the injury was aggravated by disease is immaterial.⁷⁵ If the disease causing suffering or permanent injury results, proximately, from personal injuries inflicted by the negligence of the defendant, the suffering caused by that disease constitutes an element in estimating damages.⁷⁶ Where an already-existing disease is aggravated by the injury, the plaintiff is entitled to full compensation.⁷⁷ If the disability already existed, then the defendant is only liable for such additional disability as resulted from the injury caused by him.⁷⁸

⁷² *Hardy v. Milwaukee Street Ry. Co.* 89 Wis. 183 (1895). The rule is "a reasonable certainty" that the injury will be permanent.

⁷³ *Ayres v. Delaware &c. R. R. Co.*, 158 N. Y. 254 (1899).

⁷⁴ *Staal v. Grand Street &c. R. Co.*, 107 N. Y. 625 (1887).

⁷⁵ *Baltimore City Ry. Co. v. Kemp*, 61 Md. 74 (1883); *Stewart v. City of Ripon*, 38 Wis. 584 (1875); *Allison v. Chicago &c. R. Co.*, 42 Iowa, 274 (1875); *Houston v. Traphagen*, 18 Vr. 23 (1885);

Vosburg v. Putney, 86 Wis. 278 (1893). Question of fact for the jury to determine whether a cancer did result from the injury received, the fact that the plaintiff may have had a tendency or predisposition to cancer can afford no objection to a claim for damages.

Baltimore City Ry. Co. v. Kemp, 61 Md. 74 (1883).

⁷⁶ *Houston &c. Ry. Co. v. Leslie*, 57 Tex. 83 (1882).

⁷⁷ *Ohio &c. R. R. Co. v. Hecht*, 115 Ind. 443 (1888); *Shumway v. Walworth &c. Mfg. Co.*, 98 Mich. 411 (1894); *Montgomery &c. Ry. Co. v. Mallette*, 92 Ala. 209 (1890);

Louisville &c. R. R. Co. v. North-

ington, 91 Tenn. 56 (1891); *Louis-*

ville &c. Ry. Co. v. Jones, 108 Ind. 551 (1886); *Woodward v. City of*

Boscobel, 84 Wis. 226 (1893). It is an injury wrongfully to cause,

aggravate or protract illness.

Bray v. Latham, 81 Ga. 640 (1889).

⁷⁸ *Whelan v. New York &c. R. Co.*, 38 Fed. Rep. 15 (1889). In an action based upon a second ac-

cident, the plaintiff, in addition to damages for any new injury, the result of that accident, may also

recover for any increase or aggra-

vation of the old injuries by

reason of the second accident.

Full recovery may be had, although the injured person was, on account of previous condition of life, predisposed to injury.⁷⁹ A latent disease, which might never have exhibited itself, was developed by, and resulted from, an injury. It was held to be a proper element of damage.⁸⁰ Although the plaintiff be in delicate health, she is not limited to damages that would have followed if she had been in good bodily health.⁸¹ After the injury, the plaintiff drove several miles, exposed to the rain, and caught cold and aggravated the injury; such exposure was the natural result of the injury.⁸² The fact that the plaintiff may have had a tendency or predisposition to cancer is not a defense.⁸³ It is an element of damages that the injuries might render child-bearing perilous to life.⁸⁴

§ 237. Plaintiff must use reasonable efforts to mitigate injury.

— The plaintiff must use such reasonable efforts as are in his power to mitigate the consequences of the injury.⁸⁵ Failing to use such reasonable means, he cannot recover for the suffer-

⁷⁹ Fright causing nervous convulsions and illness. *Purcell v. St. Paul &c. Ry. Co.*, 48 Minn. 134 &c. R. R. Co., 95 Mo. 169 (1888); (1892); *Crane Elevator Co. v. Lip-Sloane v. Southern Cal. Ry. Co.*, 63 Fed. Rep. 942 (1894); 111 Cal. 669 (1896).
C. C. A. 521.

⁸⁰ *La Pleine v. Morgan &c. Co.*, 40 La. Ann. 661 (1888); *Louisville &c. Ry. Co. v. Falvey*, 104 Ind. 409 (1885); 7 Am. & Eng. Ency. of Law (2d ed.), p. 388. Plaintiff had Bright's disease. *Louisville &c. Ry. Co. v. Snyder*, 117 Ind. 435 (1888). Scrofulous tendency. *Stewart v. City of Ripon*, 38 Wis. 584 (1875). Consumption. *Hurley v. New York &c. Brewing Co.*, 43 N. Y. Supp. 259 (1897). Erysipelas. *Dickson v. Hollister*, 123 Pa. St. 421 (1889). Paralysis. *Bishop v. St. Paul City Ry. Co.*, 48 Minn. 26 (1892). Catarrh. *Quackenbush v. Chicago &c. Ry. Co.*, 73 Iowa, 458 (1887).

⁸¹ *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 74 (1883).

⁸² *Ehrgott v. Mayor &c. New York*, 96 N. Y. 264 (1884). When the injury caused insanity, which, in turn, caused suicide, the death was too remote. *Scheffer v. Washington &c. R. R. Co.*, 105 U. S. 249 (1881).

⁸³ *City of Elgin v. Riordan*, 21 Ill. App. 600 (1886); *Louisville &c. R. R. Co. v. Falvey*, 104 Ind. 409 (1885); *City of Bradford v. Downs*, 126 Pa. St. 622 (1889); *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20 (1884); *Citizens R. R. Co. v. Hobbs*, 15 Ind. App. 610 (1896);

⁸⁴ *Tice v. Munn*, 94 N. Y. 621 (1887). Field on Damages, p. 130.

ing and loss of capacity caused by his neglect to use such means.⁸⁶ If the plaintiff employs a physician, the damages will not be mitigated, although his condition might have been improved by more skillful treatment.⁸⁷ It is not necessary that the plaintiff employs the best medical and surgical skill to be had in effecting a cure. If he used reasonable and ordinary care in the selection of a physician or surgeon, it is sufficient.⁸⁸ Negligence of the plaintiff in such cases is generally a question for the jury.⁸⁹

§ 238. **Deformity — Anguish of mind — Inconvenience.**— Disfigurement of the person is an element of damage;⁹⁰ or permanent annoyance caused by deformity.⁹¹ It was held not error to

⁸⁶ 7 Am. & Eng. Ency. of Law 2d ed. p. 388. It is his duty to employ such servants and nurses as ordinary prudence in his situation may require, and to use ordinary judgment and care in doing so, and to select only such as are of at least ordinary skill and care in their profession. *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20 (1884); *Citizens' Street Ry. Co. v. Hobbs*, 15 Ind. App. 610 (1896). The law does not make him an insurer in such case. *Ib.*

⁸⁷ *Collins v. City of Council Bluffs*, 32 Iowa, 324 (1871); *Rice v. City of Des Moines*, 40 id. 638 (1875); *Sullivan v. Tioga R. R. Co.*, 112 N. Y. 643 (1889); *Loeser v. Humphrey*, 41 Ohio St. 378 (1884); *Selleck v. City of Janesville*, 100 Wis. 157 (1898); *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20 (1884). The defendant is liable for the increased damages, if any, arising from the unskillful treatment of the plaintiff, without any fault on his part, by a surgeon of ordinary professional skill and knowledge. *Stover v. Inhabitants of Bluehill*, 51 Me. 439 (1863); *Tuttle v. Farmington*, 58 N. H. 13 (1876).

⁸⁸ *Collins v. City of Council Bluffs*, 32 Iowa, 324 (1871); *Moore v. City of Kalamazoo*, 109 Mich. 176 (1896); *Heintz v. Caldwell*, 16 Ohio C. C. 630 (1898); *New York &c. Telephone Co. v. Bennett*, 16 N. Y. 50 (1876). See *Lyons v. Erie Ry. Co.*, 57 N. Y. 489 (1874). But damages caused by plaintiff's negligence in the employment of medical aid are not chargeable to the defendant. *City of Crete v. Childs*, 11 Neb. 252 (1881). The injured person is not bound to refrain from taking exercise. *Foels v. Town of Tonawanda*, 59 Hun, 567 (1891); 14 N. Y. Supp. 46. ⁸⁹ *Bardwell v. Town of Jamaica*, 15 Vt. 438 (1843).

⁹⁰ *Mayor &c. of Birmingham v. Lewis*, 92 Ala. 352, 357 (1890); *Newbury v. Getchel &c. Mfg. Co.*, 100 Iowa, 441 (1896).

⁹¹ *Sherwood v. Chicago &c. Ry. Co.*, 82 Mich. 374, 383 (1890).

charge the jury that "mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows."⁹² Serious injury of a young girl, which impairs her prospects of marriage when she reaches a marriageable age, is an element of damage.⁹³ Inconvenience is not included in compensatory damages,⁹⁴ or lack of personal enjoyment.⁹⁵ Anguish of mind, arising from a contemplation of disfigurement of the person, is not an element of damages.⁹⁶

§ 239. **Mitigation of damages — Accident insurance.**— The fact that the plaintiff held an accident insurance policy when injured, does not affect or diminish the damages.⁹⁷

§ 240. **Character of plaintiff or defendant not in issue.**— The character of the plaintiff cannot be considered as an element of calculation, in estimating the amount of damages. An instruction submitting it to the jury for such purpose is error.⁹⁸ So of the defendant. Nor is it admissible to introduce evidence of the poverty or wealth of the plaintiff or defendant.⁹⁹ Evi-

⁹² *Heddles v. Chicago &c. Ry. Co.*, 77 Wis. 228 (1890). It was held that such charge, not being intended to specify new elements or grounds of damages, but merely to indicate the causes from which mental pain and suffering would be likely to arise, was not error.

⁹³ *Smith v. Pittsburg &c. Ry. Co.*, 90 Fed. Rep. 783 (1898).

⁹⁴ *Jenson v. Chicago &c. Ry. Co.*, 86 Wis. 589 (1893).

⁹⁵ *City of Columbus v. Strassner*, 124 Ind. 482 (1890).

⁹⁶ *Chicago &c. R. R. Co. v. Hines*, 45 Ill. App. 299 (1892).

⁹⁷ *Harding v. Town of Townsend*, 43 Vt. 536 (1869); *Althorf v. Wolfe*, 22 N. Y. 355 (1860); *Coulter v. Pine Township*, 164 Pa. St. 543 (1894). But the fact that the plain-

tiff had, after the injury, received a salary as postmaster, is to be considered on the question of damages. *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1, 16 (1896).

⁹⁸ *Johnson v. Wells &c. Co.*, 6 Nev. 224 (1870). Moral character of the plaintiff. *Indianapolis &c. Ry. Co. v. Bush*, 101 Ind. 582 (1884).

⁹⁹ *Chicago &c. Ry. Co. v. Bayfield*, 37 Mich. 205 (1877); *Shea v. Potrero &c. R. R. Co.*, 44 Cal. 414 (1872); *Green v. Southern Pacific Co.*, 122 Cal. 563 (1898); *Eagle Packet Co. v. Defries*, 94 Ill. 598 (1880); *Barbour County v. Horn*, 48 Ala. 566 (1872); *Driess v. Frederick*, 57 Tex. 70 (1882); *Chicago City &c. Ry. Co. v. Henry*, 62 Ill.

dence that the plaintiff was a man of intemperate habits, and when intoxicated was unable to transact business, is not admissible on the question of damages.¹

§ 241. **Special damages — Exemplary damages distinguished.**

— “Special damage is that which the law does not necessarily imply that the plaintiff has sustained from the act complained of. It is often very difficult to distinguish general from special damage. The necessary result of an injury is often and easily confounded with the natural and proximate result, and all legal damage, whether general or special, must naturally and proximately result from the act or default complained of. It is difficult to lay down any general rule by which to determine when the law implies the damage and when it does not. It would seem that when the consequences of an injury are peculiar to the circumstances and condition of the injured party, the law could not imply the damage simply from the act causing the injury.”² Exemplary damages are not special damages. They may be recovered, although not specially alleged and claimed in the complaint.³

§ 242. **Special damages — Pleading.**— Some of the courts hold that if special damages are to be proved, *i. e.*, such damages as do not necessarily arise from the act complained of, and

142 (1871); *Schwanzer v. Brooklyn R. R. Co.*, 45 N. Y. Supp. 889 (1897); *Belknap v. Boston &c. R. R. Co.*, 49 N. H. 358 (1870); *Barnes v. Keene*, 132 N. Y. 13 (1892); 18 App. Div. 205; *Missouri Pacific R. Co. v. Lyde*, 57 Tex. 505 (1882).

1 *Baltimore &c. R. R. Co. v. Borteler*, 38 Md. 568 (1873). Nor can the plaintiff show that he has dependent children, a large or small family, for the purpose of enhancing damage. *Shaw v. Boston &c. R. R. Co.*, 8 Gray, 45 (1857); *City of Joliet v. Conway*, 119 Ill. 489 (1887); *Kreuziger v. Chicago &c. Ry. Co.*, 73 Wis. 158 (1888).

2 *Loomis, J., in Tomlinson v. Town of Derby*, 43 Conn. 562, 567 (1876). In Connecticut the technical rule of the common law is adhered to closely; that where the damages from an act complained of are special, the matter must be distinctly averred in the declaration in order to apprise the defendant of the nature of the claim. See *Squier v. Gould*, 14 Wend. 159 (1835); *Carples v. New York &c. R. R. Co.*, 44 N. Y. Supp. 670 (1897); 16 App. Div. 158.

3 *Wilkinson v. Searcy*, 76 Ala. 176 (1884); *Alabama &c. R. R. Co. v. Arnold*, 84 id. 159 (1887).

consequently not implied by law at the time of the injury, they should be specially pleaded.⁴

§ 243. **Punitive — Vindictive — Exemplary damages.**— Punitive, vindictive and exemplary damages are, in legal contemplation, synonymous terms.⁵ They are sometimes called smart money.⁶ These terms do not imply that the award of such damages is intended by law as a punishment for a violation of criminal law.⁷ Exemplary damages may be allowed in actions based upon negligence, when such negligence is so gross and culpable as to evince utter recklessness.⁸ The injury need not be willful.⁹ There must be willful misconduct or conscious indifference to consequences.¹⁰ In Kentucky they are allowed

⁴ See § 163.

Connecticut: *Taylor v. Town of Monroe*, 43 Conn. 36 (1875); *Tomlinson v. Town of Derby*, id. 562 (1876).

Illinois: *City of Chicago v. O'Brennan*, 65 Ill. 160 (1872).

Massachusetts: Plaintiff's occupation and means of earning support. *Baldwin v. Western R. R. Co.*, 4 Gray, 333 (1855). Decided under Practice Act, Stats. 1852, chap. 312, § 6.

Michigan: *Silsby v. Michigan Car Co.*, 95 Mich. 204 (1893). Such as loss of profits.

New York: *Squier v. Gould*, 14 Wend. 159 (1835).

Wisconsin: *Luck v. City of Ripon*, 52 Wis. 196 (1881).

⁵ *Chiles v. Drake*, 2 Metc. 146 (1859, Ky.).

⁶ *Lake Shore &c. Ry. Co. v. Prentice*, 147 U. S. 107 (1892).

⁷ *Bixby v. Dunlap*, 56 N. H. 456 (1876); *Augusta &c. R. R. Co. v. Randall*, 79 Ga. 304 (1887); *Louisville &c. Ry. Co. v. Wolfe*, 128 Ind. 347 (1890). They are given not as a punishment, but to deter the

wrongdoer from repeating the trespass. *Chattanooga &c. R. R. Co. v. Liddell*, 85 Ga. 482 (1890); *Samuels v. Richmond &c. R. R. Co.*, 35 So. Car. 493 (1891).

⁸ *Thomas on Neg.* 476; *Lake Shore &c. Ry. Co. v. Prentice*, 147 U. S. 101 (1892); *Columbus &c. Ry. Co. v. Bridges*, 86 Ala. 448 (1888); *Alabama &c. R. R. Co. v. Arnold*, 80 id. 600 (1886); *Alabama &c. R. R. Co. v. Hill*, 90 id. 71 (1890); 93 id. 514. See *Fay v. Parker*, 53 N. H. 342 (1872).

⁹ *Wilkinson v. Searcy*, 76 Ala. 176 (1884). Are not special damages and may be recovered, although not specially alleged and claimed in the complaint. See also 84 Ala. 159 (1887).

¹⁰ *McFee v. Vicksburg &c. R. R. Co.*, 42 La. Ann. 790 (1890); *Chattanooga &c. R. R. Co. v. Liddell*, 85 Ga. 482 (1890); *Hoffman v. Northern Pacific R. R. Co.*, 45 Minn. 53 (1890); *Roberts v. Mason*, 10 Ohio St. 277 (1859); *Hart v. Charlotte &c. R. R. Co.*, 33 So. Car. 427 (1890); *Downey v. Chesapeake &c. Ry. Co.*, 28 W. Va. 732 (1886).

for gross negligence,¹¹ or where the commission of the act complained of is accompanied with circumstances of aggravation.¹² A corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation.¹³ So a corporation may recover exemplary damages for a malicious and oppressive trespass.¹⁴ "In actions of tort, the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required to be proved in order to charge him with exemplary or punitive damages."¹⁵ They cannot be awarded against a municipal corporation.¹⁶

¹¹ *Louisville &c. R. R. Co. v. Mitchell*, 87 Ky. 327 (1888). See *Missouri Pacific R. R. Co. v. Johnson*, 72 Tex. 95 (1888); *Patterson v. South &c. R. R. Co.*, 89 Ala. 318 (1889). The propriety and legality of the imposition of punitive damages for a violation of duty have been recognized by repeated judicial decisions for more than a century. Mr. Justice Field

¹² *Chiles v. Drake*, 2 Metc. 146 (1859, Ky.). This is said to be a settled rule of law in Kentucky. *Emblen v. Myers*, 6 Hurlst. & N. 54 (1860). When the negligence is willful.

¹³ *Lake Shore &c. Ry. Co. v. Prentice*, 147 U. S. 101, 111 (1892); *Atlantic &c. Ry. Co. v. Dunn*, 19 Ohio St. 162 (1869); *id.* 590; *Hagan v. Providence &c. R. R. Co.*, 3 R. I. 88 (1854). ¹⁶ "The inhabitants of the locality, constituting, as they do, the corporation (*i. e.*, the municipal corporation), really pay the damages, and where punishment in the form of exemplary damages is inflicted it falls on them, and this is neither just nor consistent with the underlying principle which sustains the rule declaring that vindictive damages may be recovered." *Elliott on Roads & Streets*, 652; *Field on Dam.*, § 86; *City of Chicago v. Kelly*, 69 Ill. 475 (1873); *City of Parsons v. Lindsay*, 26 Kan. 426, 434 (1881).

¹⁴ *International &c. R. R. Co. v. Telephone &c. Co.*, 69 Tex. 277 (1887). it falls on them, and this is neither just nor consistent with the underlying principle which sustains the rule declaring that vindictive damages may be recovered."

¹⁵ Mr. Justice Gray in *Lake Shore &c. Ry. Co. v. Prentice*, 147 U. S. 101, 107 (1892). See *Missouri Pacific Ry. Co. v. Humes*, 115 id. 512 (1885); *Barry v. Edmunds*, 116 id. 550 (1885); *Denver &c. Ry. Co. v. Harris*, 122 id. 597 (1886); *Minneapolis &c. Ry. Co. v. Beckwith*,

Nor for negligence simply, unless aggravating circumstances, or the elements of willfulness, are present.¹⁷

¹⁷ Alabama: *Alabama &c. R. R. yet definitely settled. Rutherford Co. v. Arnold*, 84 Ala. 159 (1887); *v. Shreveport &c. R. R. Co.*, 41 La. 80 id. 600; *Patterson v. Southern Ann.* 793 (1889). See *McFee v. &c. R. R. Co.*, 89 id. 318 (1889). *Vicksburg &c. R. R. Co.*, 42 id. 790. There must be circumstances of (1890).

aggravation or willful wrong. *Alabama &c. R. R. Co. v. Sellers*, 93 Ala. 9 (1890). Maryland: *Eliason v. Grove*, 85 Md. 215 (1897).

Arkansas: The element of willfulness or conscious indifference to consequences must be present from which malice may be inferred. *St. Louis &c. Ry. Co. v. Hall*, 53 Ark. 7 (1890). Massachusetts: If there is wantonness or mischief, causing additional bodily or mental damages, in the injurious act of the servant within the scope of his employment, that wantonness or mischief will enhance the damages against the master. *Hawes v. Knowles*, 114 Mass. 518 (1874).

California: *Yerian v. Linkletter*, 80 Cal. 135 (1889). Michigan: *Lucas v. Michigan Central R. R. Co.*, 98 Mich. 1 (1893).

Colorado: Not in a civil action, although the tort causing the injury sued for is willful and is not punishable criminally. *Greeley &c. Ry. Co. v. Yeager*, 11 Colo. 345 (1888). Minnesota: *Hoffman v. Northern Pacific R. R. Co.*, 45 Minn. 53 (1890).

Connecticut: Negligence must be gross or wanton. *Gibney v. Lewis*, 68 Conn. 392 (1896). Mississippi: *Alabama &c. Ry. Co. v. Purnell*, 69 Miss. 652 (1892).

Florida: *Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1 (1892). Missouri: *Stoher v. St. Louis &c. Ry. Co.*, 91 Mo. 509 (1887).

Georgia: *Chattanooga &c. R. R. Co. v. Liddell*, 85 Ga. 482 (1890). Nebraska: *Boyer v. Barr*, 8 Neb. 68 (1878).

Indiana: When malice and oppression weigh in the controversy and the act is punishable as a crime. *Louisville &c. Ry. Co. v. Wolfe*, 128 Ind. 347 (1890). New Hampshire: *Bixby v. Dunlap*, 56 N. H. 456 (1876); *Taylor v. Grand Trunk Ry. Co.*, 48 id. 304 (1869); *Fay v. Parker*, 53 id. 342 (1872). Not against an insane person. *Jewell v. Colby*, N. H. ; 24 Atl. Rep. 902 (1891).

Iowa: *Cameron v. Bryan*, 89 Iowa, 214 (1893). New York: *Townsend v. New York &c. R. R. Co.*, 56 N. Y. 295 (1874); *Cleghorn v. New York &c. R. R. Co.*, id. 44 (1874); *Muckle v. Rochester &c. Ry. Co.*, 79 Hun, 32 (1894); 29 N. Y. Supp. 732.

Kentucky: *Givens v. Kentucky Central Ry. Co.*, 89 Ky. 231 (1884). North Carolina: *Holmes v. Caro-*

Louisiana: In Louisiana, it is said that the doctrine of exemplary or punitive damages, as applicable to common carriers, is not

§ 244. **Damages resulting indirectly from injuries to the person.**—The second class of cases is that in which the action is brought to recover damages for the injuries, resulting indirectly from the injury to the person, the plaintiff standing in a legal relation to the person directly injured, such as husband and wife, parent and child, master and servant. In case of the wife being injured, in addition to the recovery of damages by the wife, which, at common law, are limited to the injury done to the wife,¹⁸ the husband has a right of action to recover for his loss, growing out of the personal injury to his wife, from the same wrongful act.

§ 245. **Damages to husband from injury to wife.**—The husband has a right of action to recover damages as compensation for the expenses incurred in his wife's cure.¹⁹ He can also

lina Central R. R. Co., 94 No. Car. West Virginia: Talbot v. West 318 (1886); Hansley v. Jamesville Virginia Ry. Co., 42 W. Va. 560 &c. R. R. Co., 115 id. 602 (1894). (1896). See 12 Am. & Eng. Ency.

Oregon: Sullivan v. Oregon Ry. of Law (2d ed.), p. 4.
Co., 12 Or. 392 (1885). ¹⁸ Thomas on Neg. 455, 458;

Pennsylvania: Lake Shore &c. Fuller v. Naugatuck R. R. Co., 21 Ry. Co. v. Rosenzweig, 113 Pa. St. Conn. 557 (1852); Baltimore City 519 (1886); Philadelphia Traction Ry. Co. v. Kemp, 61 Md. 74 (1883); Co. v. Orbann, 119 id. 37 (1888). Barnes v. Hund, 11 Mass. 59 (1814);

Rhode Island: Hagan v. Providence &c. R. R. Co., 3 R. I. 88 456 (1874); Heirn v. M'Caughan, 32 (1854). Miss. 17 (1856); Lewis v. Babcock,

South Carolina: Samuels v. Richmond &c. R. R. Co., 35 So. Car. 18 Johns. 443 (1821); Brooks v. 493 (1891); Mack v. South Bound Schwerin, 54 N. Y. 343 (1873); City of Joliet v. Conway, 119 Ill. 489 R. R. Co., 52 id. 323 (1897). (1887); Klein v. Jewett, 11 C. E.

Tennessee: East Tennessee &c. Gr. 474 (1875, N. J.). A married Ry. Co. v. Lee, 90 Tenn. 570 (1891). woman can recover for expenses

Texas: Houston &c. R. R. Co. incident to her sickness when the v. Baker, 57 Tex. 419 (1882); Mis- sole credit was given to her. Lucas sissippi Pacific R. R. Co. v. Johnson, v. Detroit City Ry. Co., 92 Mich. 72 id. 95 (1888); id. 165. 412 (1892); Atlantic &c. R. R. Co.

Virginia: Norfolk &c. R. R. Co. v. Ironmonger, 95 Va. 625 (1898); v. Lipscomb, 90 Va. 137 (1893). City of Columbus v. Strasser, 138

Washington: Not in Washington Ind. 301 (1894).

when the defendant is guilty of ¹⁹ Klein v. Jewett, 11 C. E. Gr. gross negligence. Spokane Truck 474 (1875, N. J.); Tuttle v. Chicago Co. v. Hoefer, 2 Wash. St. 45 &c. R. R. Co., 42 Iowa, 518 (1876); (1891). Northern Central Ry. Co. v. Mills,

recover compensation, as an element of his damages, for the loss of his wife's services.²⁰ He cannot recover anything for his wife's personal sufferings,²¹ nor for damages arising from the injury which results in depriving the husband of prospective offspring.²² The husband may bring a suit alone to recover the damages caused to him by the injury to his wife.²³ The measure of damages will be the loss of the services of his wife and the costs incurred by him for medical attendance, nursing, etc.²⁴ In Missouri it was held, that in aggravated cases,

61 Md. 355 (1883); *Hawkins v. his wife*, *Ainley v. Manhattan Ry. Front Street Cable Ry. Co.*, 3 Co., 47 Hun, 206 (1888).

Wash. St. 592 (1892); *Henny v. Klopfer*, 147 Pa. St. 178 (1892); *Union Pacific Ry. Co. v. Jones*, 21 Colo. 340 (1895). When the suit is by the husband for injuries to the wife, the mental suffering of the wife is an element of damages. *Tompkins v. West*, 56 Conn. 478 (1888).

²⁰ *Filer v. New York &c. R. R. Co.*, 49 N. Y. 47 (1872); *McDonald v. Chicago R. R. Co.*, 26 Iowa, 124 (1868); *Klein v. Jewett*, 11 C. E. Gr. 474 (1875, N. J.); *Brooks v. Schwerin*, 54 N. Y. 343 (1873); *Hopkins v. Atlantic &c. R. R. Co.*, 36 N. H. (1857); *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592 (1892); *Citizens Street Ry. Co. v. Twiname*, 121 Ind. 375 (1889); *Metropolitan Street R. R. Co. v. Johnson*, 91 Ga. 466 (1893); *Lindsey v. Town of Danville*, 46 Vt. 144 (1873); *Readdy v. Borough of Shamokin*, 137 Pa. St. 98 (1890); *Henny v. Klopfer*, 147 Pa. St. 178 (1892); *Hopkins v. Atlantic &c. R. R. Co.*, 36 N. H. 9 (1857). But he cannot recover for the society, companionship and solace of his wife. *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592 (1892); *Board of Commissioners v. Legg*, 93 Ind. 523 (1883). *Contra*, *Union Pacific Ry. Co. v. Jones*, 21 Colo. 340, 345 (1895). May recover for the assistance and society of

Campbell v. Harris, 4 Tex. Civ. App. 636 (1893). Injury to the wife caused by a fellow servant of the husband; suit in the name of the husband; the rule of fellow servants is not applicable.

²² *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417 (1894).

²³ See § 113; *Thomas on Neg.* 456; *Rogers v. Smith*, 17 Ind. 323 (1861); *McKinney v. Western Stage Co.*, 4 Iowa, 420 (1857); *Long v. Morrison*, 14 Ind. 595 (1860); *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592 (1892).

²⁴ *Mowry v. Chaney*, 43 Iowa, 609 (1876); *Tuttle v. Chicago &c. R. R. Co.*, 42 Iowa, 518 (1876); *Smith v. City of St. Joseph*, 55 Mo. 456 (1874); *Meier v. Missouri Pacific Ry. Co.*, 12 Mo. App. 35 (1882); *Washington &c. R. R. Co. v. Hickey*, 12 App. Cas. (D. C.) 269, 275 (1898); *Kavanaugh v. City of Janesville*, 24 Wis. 618 (1869); *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592 (1892).

the husband may recover compensation for his own services in waiting upon his wife during her illness.²⁵

§ 246. **Damages to parent from injury to child.**— A parent has a right of action to recover compensation, as elements of damage, for the loss of services caused by an injury to a minor child.²⁶ The plaintiff is entitled to recover not only for the loss of services up to the time of the trial, but for prospective loss during the child's minority. Also, for expenses actually and necessarily incurred, or which are immediately necessary, in consequence of the injury, in the care and cure of the child.²⁷

²⁵ *Smith v. City of St. Joseph*, 55 Mo. 456 (1874); *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152 (1893). In New York it was held under the provisions of the Act of 1860 (chapter 90, Laws of 1860), concerning the rights and liabilities of husband and wife, as modified in 1862 (chapter 172, Laws of 1862), which authorizes a married woman to perform any labor or service on her separate account, and gives her her earnings therefor, and empowers her to bring an action in her own name for injuries to her person, the services of the wife in the household still belong to her husband, and so far as an injury to her disables her from performing such services the loss is his, and he, and not she, can recover therefor. But when she labors for another, her services and earnings no longer belong to her husband, but to herself, and so far as she is disabled from performing such services, she can recover for the loss. *Brooks v. Schwerin*, 54 N. Y. 343 (1873). In Iowa it was held that the wife cannot recover for the loss of time caused by the injury to herself, unless she is engaged in the prosecution of a separate, independent

business, which thereby suffers detriment. *Tuttle v. Chicago & C. R. R. Co.*, 42 Iowa, 518 (1876). Action by a married woman to recover damages for personal injuries; it was held error to permit her to testify that her husband, who lived apart from her, contributed nothing towards her support. *Burleson v. Village of Reading*, 110 Mich. 512 (1896).

²⁶ See § 120; *Elliott on Roads & Streets*, 654; *Shearm. & Redf. on Neg.* (5th ed.), § 763; *Oakland Ry. Co. v. Fielding*, 48 Pa. St. 320 (1864); *Karr v. Parks*, 44 Cal. 46 (1872). For a period not exceeding the minority of the child. *Traver v. Eighth Ave. R. R. Co.*, 42 N. Y. 497; 3 Keyes, 497 (1867); *Barnes v. Keene*, 132 N. Y. 13 (1892). From which must be deducted the cost of maintenance and support. *Benton v. Chicago & C. R. R. Co.*, 55 Iowa, 496 (1881); *St. Louis & C. Ry. Co. v. Freeman*, 36 Ark. 41 (1880); *Pennsylvania Co. v. Lilly*, 73 Ind. 252 (1881); *Morgan v. Southern Pacific Ry. Co.*, 95 Cal. 510 (1892).
²⁷ *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95 (1888). Future prospective contingent expenses can only be recovered, if at all, in an action by the child; such as

The parent may recover for the future increased expenses in bringing up the child in consequence of the injury.²⁸ The mental suffering of the parent, caused by the injury to the child, cannot be included in the damages.²⁹ But the pain suffered by the child, in so far as it prevented the child from being of service to the parents, may be considered in estimating damages.³⁰ Although there be no loss of service, such damages are not those resulting from the death of the child, and the right of recovery is not affected by the death of the child.³¹ When the injury results in death, such loss of services only as accrued, intermediate to the injury and the death, may be recovered.³²

§ 247. **Damages to master from injury to servant.**—The master has a right of action against the wrongdoer to recover compensation, as elements of damage, for the loss of the services of his servant, when deprived of them by an injury to the servant.³³ The measure of damages in such cases is the value of the services lost.

§ 248. **Interest.**—It has been a mooted question whether interest can be added by the jury to the damages awarded, in

expenses for a surgeon, that may be necessary. *Netherland-American Steam Co. v. Hollander*, 59 Fed. Rep. 417 (1894); 8 C. C. A. 169; *Dollard v. Roberts*, 130 N. Y. 269 (1891). The fact that a child has attained its majority does not, *ipso facto*, work the emancipation of the child, although it does give either the child or the parent the right to renounce the relation and avoid the duty and liability incident thereto. *Union Pacific Co. v. Jones*, 21 Colo. 340 (1895). A minor son whose father is entitled to his services cannot recover for time lost, or inability to work during minority. *Stewart v. City of Ripon*, 38 Wis. 584 (1875); *Jordan v. Bowen*, 14 Jones & S. 355 (1880).

²⁸ *Lang v. New York &c. R. R. Co.*, 51 Hun, 603 (1889); 4 N. Y. Supp. 565.

²⁹ *City of Galveston v. Barbour*, 62 Tex. 172 (1884); *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. St. 372 (1858).

³⁰ *Walker v. Second Ave. R. R. Co.*, 6 N. Y. Supp. 536 (1889).

³¹ *Trow v. Thomas*, 70 Vt. 580 (1898). Damages resulting from the death, such as the expenses of burial, and the loss of service between the death and majority, are not recoverable. *Following Sherman v. Johnson*, 58 Vt. 40 (1886).

³² *Davis v. St. Louis &c. Ry. Co.*, 53 Ark. 117 (1890).

³³ *Hall v. Hollander*, 4 B. & C. 660 (1825); *Gilbert v. Schwenck*, 14 M. & W. 488 (1845); *Martinez v. Gerber*, 3 Man. & G. 88 (1841); *Woodward v. Washburn*, 3 Den. 369 (1846).

actions of tort. It is the general practice of juries to award a lump sum, without stating whether interest is, or is not, included. The rule of law was stated by Simmons, J., thus: "It is held, in actions of tort, the jury may, in their discretion, calculate interest on the damages actually sustained, and add it to their verdict, but it has long been a controverted question whether, in actions of tort, interest should be given, as matter of right, in addition to the damages."³⁴ In North Dakota it was held, that interest may be awarded or withheld at the discretion of the jury.³⁵ In Pennsylvania it was held, error to instruct a jury to allow interest, on the damages they may award, from the date of the accident to the date of the verdict.³⁶ Interest at the legal rate cannot be added by the jury, at their discretion, to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual values, can be thus increased.³⁷ In actions for causing death, by statute, in New York, where final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded interest thereupon, from the decedent's death, and include it in the judgment.³⁸

§ 249. Reduction of verdict by the court.— When the amount of the verdict is deemed by the court to be excessive, it is com-

³⁴ *Central R. R. Co. v. Sears*, 66 Ga. 499, 501 (1881). As a matter of law, unliquidated demands arising *ex delicto* do not bear interest. *Western & C. R. R. Co. v. Brown*, 102 Ga. 13 (1897).

³⁵ *Ell v. Northern Pacific R. R. Co.*, 1 No. Dak. 336 (1891). In the District of Columbia it was held, the jury may, in their discretion, allow in their verdict interest on the money actually laid out and expended by the plaintiff, by way of damages. *Washington & C. R. R. Co. v. Hickey*, 12 App. Cas. (D. C.) 269 (1898).

³⁶ *Pittsburgh & C. Ry. Co. v. Taylor*, 104 Pa. St. 306 (1883). See *Plymouth Township v. Graver*, 125 id. 24 (1889).

³⁷ *Western & C. R. R. Co. v.*

Young, 81 Ga. 397 (1888); *Sonnenfeld Millinery Co. v. Peoples Ry. Co.*, 59 Mo. App. 668 (1894); *Jamison v. New York & C. Ry. Co.*, 42 N. Y. Supp. 915 (1896); 11 App. Div. 50; *Washington & C. R. R. Co. v. Harmon*, 147 U. S. 571 (1892). See *Waterman v. Chicago & C. R. Co.*, 82 Wis. 613 (1892); *Duryee v. Mayor & C. of New York*, 96 N. Y. 477 (1884).

³⁸ Chap. 78, Laws 1870; *Bank's Ann. Code Civ. Pro.* 1888; *Salter v. Utica & C. R. R. Co.*, 86 N. Y. 401 (1881); *Manning v. Port Henry & C. Co.*, 91 id. 665 (1883); 27 Hun, 219; *Erwin v. Neversink Steamboat Co.*, 23 Hun, 578 (1881). See *Tiffany on Death by Wrongful Act*, § 175.

mon practice to allow the verdict to stand, upon condition that the plaintiff remit a part of the sum awarded.³⁹ This is said to be good practice to the end of saving vexatious, expensive and prolonged litigation,⁴⁰ because courts are more reluctant to grant new trials for excessive damages in actions for personal injuries, than in any other class of cases.⁴¹ In New York it has been held, that the Court of Appeals, in an action for negligence, cannot reverse a judgment on account of excessive damages.⁴² In Illinois it has been held, that the reasonableness of the damages belongs to the appellate court.⁴³ Where a portion of the verdict was limited so as to come within the measure of damages proved, a new trial was properly refused.⁴⁴ In New Jersey, by statute, the excessiveness of the verdict may be assigned as a cause of error on appeal by writ of error.⁴⁵

³⁹ *Tiffany on Death by Wrongful Act*, § 178; *Clapp v. Hudson River R. R. Co.*, 19 Barb. 461 (1854); *Missouri Pacific Ry. Co. v. Dwyer*, 36 Kan. 58 (1886); *Florida Ry. &c. Co. v. Webster*, 25 Fla. 426 (1889). In Wisconsin it is allowable only when the illegal portion of the judgment is readily severable from the rest. *Potter v. Chicago &c. R. R. Co.*, 22 Wis. 615 (1868). Or only in a clear case. *Wright v. City of Fort Howard*, 60 Wis. 119 (1884). The United States Supreme Court held it to be error for the court, to reduce the verdict by the entering of an absolute judgment. *Kennon v. Gilmer*, 131 U. S. 22 (1888). Such practice disapproved by Eakin, J., in a dissenting opinion, in *Little Rock &c. Ry. Co. v. Barker*, 39 Ark. 491, 517 (1882). Distinction made between actions under the statute for injuries causing death where the damages are wholly compensatory for pecuniary loss, and actions for willful torts or for personal injuries, in which punitive damages or damages for in-

juries not pecuniary in their nature, such as injuries to the feelings, for mental and physical pain and suffering, are allowed. *Hutchins v. St. Paul &c. Ry. Co.*, 44 Minn. 5 (1890).

⁴⁰ *Florida Ry. &c. Co. v. Webster*, 25 Fla. 426 (1889).

⁴¹ *Quinn v. South Carolina Ry. Co.*, 29 So. Car. 388 (1888). The Supreme Court of New Jersey said, in suits to recover for personal injuries, or for death by wrongful act, a verdict which is grossly excessive will be set aside, without regard to the number of times the case had previously been tried. *Graham v. Consolidated Traction Co.*, 33 Vr. 90 (1898). In that case the jury awarded \$5,000 for the death of a child between four and five years old on two different trials.

⁴² *Gale v. New York &c. R. R. Co.*, 76 N. Y. 594 (1879).

⁴³ *Chicago &c. R. R. Co. v. O'Connor*, 119 Ill. 586 (1886).

⁴⁴ *Central R. R. Co. v. Crosby*, 74 Ga. 737 (1885).

⁴⁵ P. L. 1899, p. 323.

§ 250. Verdict may be set aside if damages awarded are inadequate.—In an action for an injury to the person, if the damages awarded be so small that, the assessment is inconsistent with the undisputed evidence, the verdict will be set aside at the instance of the plaintiff.⁴⁶ The same rule is also applied by the courts in actions brought to recover damages for causing the death of a human being under the statute; where the damages awarded are inadequate, the court may, in its discretion, set the verdict aside and grant a new trial.⁴⁷

§ 251. Verdicts for personal injuries — Excessive.—In the following cases verdicts for personal injuries have been held excessive:⁴⁸ Ten thousand dollars for injury to brakeman's leg;⁴⁹ \$6,000 for breaking kneecap;⁵⁰ \$13,500, reduced to \$7,000, for injury to leg, causing a permanent shortage, in which the physician's bill was \$1,000;⁵¹ \$8,000, reduced to \$6,000, for loss of left hand of a cooper and teamster;⁵² \$9,000, reduced to \$5,000, for loss of leg of a mason's tender;⁵³ \$6,000, reduced to \$4,000, for breaking a leg, causing curvature and permanent shortening and deformity;⁵⁴ \$5,525 for injury to eye, causing permanent injury to the sight;⁵⁵ \$10,000 for injuries to left ankle, back and side, but not permanent, the plaintiff being

⁴⁶ *Miller v. Delaware &c. R. R. Co.*, 29 Vr. 428 (1896); *Wilson v. Morgan*, id. 426 (1896). Verdict for six and one-fourth cents; provisional order for a new trial directing its reversal on payment of \$400 within thirty days, which sum the plaintiff was unwilling to accept, it was held error. The plaintiff being entitled to have his damages assessed by a jury. *Bradwell v. Pittsburgh &c. Ry. Co.*, 139 Pa. St. 404 (1890). Or when it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim. *Phillips v. Southwestern Ry. Co.*, L. R., 4 Q. B. D. 406 (1879).

⁴⁷ *Tiffany on Death by Wrongful Act*, § 179; *Moriani v. Dougherty*,

46 Cal. 26 (1873); *Wolford v. Lyon &c. Co.*, 63 id. 483 (1883).

⁴⁸ For a collection of verdicts in suits for damages for personal injuries, see *Ray on Negligence of Imposed Duties*, § 206, p. 752; also *Standard Oil Co. v. Tierney*, 14 L. R. A. 677, n.

⁴⁹ *Missouri Pacific Ry. Co. v. Dwyer*, 36 Kan. 58 (1886).

⁵⁰ *Langley v. Sixth Ave. R. R. Co.*, 16 Jones & S. 542 (1882).

⁵¹ *Coppins v. New York Central &c. R. R. Co.*, 48 Hun, 292 (1888).

⁵² *Murray v. Hudson River R. R. Co.*, 47 Barb. 200 (1866).

⁵³ *Morris v. Eighth Ave. R. R. Co.*, 68 Hun, 39 (1893).

⁵⁴ *Clapp v. Hudson River R. R. Co.*, 19 Barb. 461 (1854).

⁵⁵ *Gleason v. Inhabitants of Bremen*, 50 Me. 222 (1862).

confined to his house for a few weeks;⁵⁶ \$1,800, reduced to \$1,200, for injury to a boy between eight and nine years old, for mangling his ring and middle fingers on his left hand so as to require their amputation at the first joint;⁵⁷ \$4,000, reduced to \$2,500, to an aged female, for the fracture of one of the bones on the outer side of the left ankle and the tearing of the lateral ligaments of the ankle and injury to the joint, from which she suffered great pain, being confined to her bed for three months, requiring constant care;⁵⁸ \$25,000 for permanent injury, former verdict \$22,500, \$5,000 ordered remitted by court, interest may be taxed as costs on the amount of the verdict as reduced from the date of the original rendition;⁵⁹ \$20,750 for a broken leg, which had to be amputated, reduced to \$10,750;⁶⁰ \$28,076 computed by jury on wrong principle;⁶¹ \$8,000, reduced to \$4,000, for loss by a railroad brakeman of one foot and four toes on the other foot;⁶² \$10,000 for injuries to a married woman, when injuries were not shown to be permanent.⁶³

§ 252. **Verdicts for personal injuries — Not excessive.**— In the following cases verdicts for personal injuries have been held not excessive: Fifteen thousand dollars for injury to limb, back and nervous system of a doctor;⁶⁴ \$10,000 for loss of arm;⁶⁵ \$9,000 for loss of leg;⁶⁶ \$6,000 for loss of three fingers;⁶⁷

⁵⁶ Louisville &c. R. R. Co. v. Mattingly, Ky. (1897); 1 Am. Neg. Rep. 58.

⁵⁷ Gahagan v. Aerometer Co., 67 Minn. 252 (1897); 1 Am. Neg. Rep. 92.

⁵⁸ Johnson v. St. Paul City Ry. Co., Minn. (1897); 1 Am. Neg. Rep. 93.

⁵⁹ Waterman v. Chicago &c. R. R. Co., 82 Wis. 613 (1892).

⁶⁰ Kennon v. Gilmer, 131 U. S. 22 (1888). In that case it was held error to reduce the verdict by the court by the entering of an absolute judgment.

⁶¹ Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1 (1896).

⁶² Wood v. Louisville &c. R. R. Co., 88 Fed. Rep. 44 (1898).

⁶³ Becker v. Albany Ry. Co., 35 App. Div. 46 (1898); 5 Am. Neg. Rep. 231. Where a list of cases will be found in which verdicts have been reduced by the courts as excessive.

⁶⁴ Woodbury v. District of Columbia, 5 Macky. 127 (1886).

⁶⁵ Ketchum v. Texas &c. R. R. Co., 38 La. Ann. 777 (1886).

⁶⁶ Louisville &c. R. R. Co. v. Moore, 83 Ky. 675 (1886). Injury to a brakeman caused by the willful or gross neglect of the conductor or engineer.

⁶⁷ Murtaugh v. New York Central &c. R. R. Co., 49 Hun, 456 (1888).

\$10,000 for injuries to railroad employe who had his leg crushed, which required three amputations, and made a long stop at hospital necessary;⁶⁸ \$18,500 for injuries to boy seven years old, necessitating the amputation of both legs and impairing his mental capacities;⁶⁹ \$10,000 for ankle and foot of brakeman so crushed that it had to be amputated, crippled for life;⁷⁰ \$5,000 for a fracture of the thigh, followed by pain and permanent after-effects;⁷¹ \$4,000 where plaintiff suffered severe pain for months after the injuries, and after three years had not entirely recovered — physicians differed as to whether she would ever entirely recover;⁷² \$9,500 for permanent injury to engineer forty years old, earning \$100 per month, and could not earn as much as before the injury;⁷³ \$22,250 for loss of one arm and the use of the other, and being otherwise much bruised and injured;⁷⁴ \$1,200 for a broken leg in three places;⁷⁵ \$5,500 for broken leg and other injuries;⁷⁶ \$6,500 for laboring man earning from \$40 to \$45 per month, nervous system permanently diseased, doubtful if he will be ever able to perform manual labor;⁷⁷ \$13,500 for injury to spine, permanent and progressive;⁷⁸ \$5,100 for injury to back, right shoulder, arm and abdomen;⁷⁹ \$4,500 for injury to knee, crippling plaintiff permanently;⁸⁰ \$25,000 for injury causing a disease of the spine of a permanent nature;⁸¹ \$11,500 for injury to brakeman twenty-seven years old, earning \$60 to \$75 per month, by which his health has been permanently impaired;⁸² \$3,625 for

⁶⁸ Hollenbeck v. Missouri Pacific Ry. Co., Mo. (1897); 1 Am. Neg. Rep. 101. ⁷⁶ Murray v. Missouri Pacific Ry. Co., 101 Mo. 236 (1890).

⁶⁹ Heddles v. Chicago &c. Ry. Co., 77 Wis. 228 (1890). ⁷⁷ Olsen v. Great Northern Ry. Co., 68 Minn. 155 (1897).

⁷⁰ Louisville &c. R. R. Co. v. Mitchell, 87 Ky. 327 (1888). ⁷⁸ Fordyce v. St. Louis &c. Ry. Co., 144 Mo. 519 (1898).

⁷¹ O'Connell v. St. Louis &c. Ry. Co., 106 Mo. 482 (1891). ⁷⁹ Sproul v. City of Seattle, 17 Wash. St. 256 (1897).

⁷² Heucke v. Milwaukee City Ry. Co., 69 Wis. 401 (1887). ⁸⁰ Moore v. City of Kalamazoo, 109 Mich. 176 (1896). Or injury to ankle, \$4,500 not excessive. Foels

⁷³ Knapp v. Sioux City &c. Ry. Co., 71 Iowa, 41 (1887). v. Town of Tonawanda, 59 Hun, 567 (1891).

⁷⁴ Shaw v. Boston &c. R. R. Co., 8 Gray, 45 (1857). ⁸¹ Ehrgott v. Mayor &c. of New York, 96 N. Y. 264, 277 (1884).

⁷⁵ Rhoades v. Varney, 91 Me. 222 (1898). ⁸² Missouri &c. Ry. Co. v. Chambers, 17 Tex. Civ. App. 487 (1897).

permanent injury to arm of a minor;⁸³ \$15,000 for permanent injuries to a married woman;⁸⁴ \$10,000 for permanent injuries;⁸⁵ \$18,000 for loss of a leg below the knee, and permanent injury to the other foot, by a man forty-one years of age, who was earning \$45 per month.⁸⁶

⁸³ *Stewart v. City of Ripon*, 38 Wis. 584 (1875). ⁸⁵ *Foster v. Missouri Pacific Ry. Co.*, 115 Mo. 165 (1892).

⁸⁴ *Collins v. City of Council Bluffs*, 32 Iowa, 324 (1871). ⁸⁶ *Galveston &c. Ry. Co. v. Hynes*, Tex. Civ. App. ; 6 Am. Neg. Rep. 208 (1899).

CHAPTER IX.

DAMAGES FOR CAUSING DEATH.

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| <p>§ 253. Damages in actions for causing death — Statutes — Constitutions.</p> <p>254. Pecuniary loss the basis of damages.</p> <p>255. Elements of proof to be considered in estimating damages.</p> <p>256. Standard mortuary tables as evidence.</p> <p>257. Damages cannot be given as a <i>solatium</i>.</p> <p>258. Injury to deceased — Physical and mental suffering.</p> <p>259. Exemplary — Punitive — Damages — Statutes.</p> <p>260. Funeral expenses — Family mourning.</p> <p>261. Mitigation of damages — Insurance money.</p> <p>262. Nominal damages.</p> <p>263. Question of fact for the jury.</p> | <p>§ 264. Seven classes of cases.</p> <p>265. Action by wife for causing death of husband — Wife living in open adultery — Divorce.</p> <p>266. Action by husband for causing death of wife — Remarriage of husband.</p> <p>267. Action by parent for causing death of minor child — Question for the jury.</p> <p>268. Action by parent for causing death of adult child.</p> <p>269. Action by minor child for causing death of parent.</p> <p>270. Action by adult for causing death of parent.</p> <p>271. Action by beneficiaries for causing death of collateral relatives.</p> <p>272. Verdicts for causing death — Excessive.</p> <p>273. Verdicts for causing death — Not excessive.</p> |
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§ 253. **Damages in actions for causing death — Statutes — Constitutions.**— The third class of cases is that, in which the plaintiff in the action sues in a representative capacity for causing the death of a human being. As was pointed out in Chapter III, section 98, at common law “in a civil court, the death of a human being could not be complained of as an injury.” In 1846, the act of 9 and 10 Victoria, chapter 93, was enacted, known as Lord Campbell’s Act, which is the parent of all legislation on this subject. Since that time statutes of like purport have been enacted in all the States and territories of the United States, the District of Columbia, and the colonies of Great Britain, under which an action will lie for causing the death of a human being by wrongful act, neglect or default of another,

permitting damages to be recovered for causing such death, limiting usually the damages the jury may give in such action to the amount the jury may think "proportioned to the injury resulting from such death," or such as the jury "shall deem fair and just with reference to the pecuniary injury resulting from such death;" some of the statutes provide that the damages shall not exceed a stated amount, such as \$5,000. The language of the various statutes, on the point of damages, is dissimilar, although the general principles upon which damages are computed are substantially the same. Damages for causing death being wholly the creature of statutes, the decisions, except on the general principles, have a limited application outside of the jurisdiction of the court where rendered. They must be read in connection with the statute of the jurisdiction where made. The provisions in the several statutes are as

1 England: "The jury may give such damages as they may think proportioned to the injury resulting from such death." 9 & 10 Vict., chap. 93, § 2.

New Brunswick: "The jury may give such damages, by way of fair compensation, as they may think proportioned to the pecuniary loss resulting from such death, provided the reasonable expectation of pecuniary benefit from the continuance of the life of the deceased shall not be estimated for a period exceeding ten years." Cons. Stats., chap. 86, § 2.

Nova Scotia: "The jury may give such damages as they may think proportioned to the injury resulting from such death." Rev. Stats. 1884, chap. 116, § 2.

Ontario: Rev. Stats. 1887, chap. 135, § 3.

Quebec: "All damages occasioned by such death." Civil Code L. Can., art. 1056.

Alabama: "Such damages as the jury may assess." Code 1887, §§ 2588, 2589.

Arizona: "The jury may give

such damages as they may think proportioned to the injury resulting from such death." Rev. Stats. 1887, § 2155.

Maryland: Pub. Gen. Laws, art. 67, § 2.

South Carolina: Gen. Stats. 1882, § 2184.

Texas: Sayles' Civil Stats., art. 2909.

Arkansas: "The jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death." Mansf. Dig., § 5226.

Illinois: 1 Starr & C. Ann. Stats., chap. 70, § 2; amended by Laws of 1893.

Maine: Acts 1891, chap. 24. Life lost through defect in highway, etc., "such sum as the jury may deem reasonable as damages." Rev. Stats. 1883, chap. 18, § 80.

Michigan: How. Stats., § 8314; Montana, Comp. Stats. 1888, p. 911, § 982.

Nebraska: Comp. Laws 1881, chap. 21, § 2.

California: "Such damages may

noted.¹ Some of the statutes limit the amount that the jury

be given as, under all the circumstances of the case, may be just." Code Civ. Pro., § 377.

Idaho: Rev. Stats. 1887, § 4100; Montana, Comp. Stats. 1888, p. 62, § 14; Utah, Comp. Laws 1888, § 3179.

Colorado: "The jury may give such damages as they may deem fair and just, not exceeding \$5,000, with reference to the necessary injury resulting from such death, having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default." Gen. Stats. 1883, § 1032.

Missouri: Rev. Stats. 1889, § 4427.

Connecticut: "Just damages not exceeding \$5,000." Gen. Stats. 1888, § 1009.

Delaware: "May maintain an action for, and recover damages for, the death thus occasioned." Rev. Code 1852, p. 644, as amended by Laws of 1874, p. 644.

District of Columbia: "Such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death." Act of Congress, Feb. 17, 1885.

Florida: "The jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed." Laws of 1883, No. 27, § 2.

Georgia: "The full value of the life of the deceased, as shown by the evidence," without any "deduction for necessary or other personal expenses of the deceased had he lived." Code 1882, § 2971, as amended by Laws of 1887, No. 588, p. 43.

Kentucky: May "recover damages in the same manner that the person himself might have done for any injury where death did not ensue." Gen. Stats., chap. 57, § 1.

Louisiana: "Recover the damages sustained." Civil Code, art. 2315, as amended by Act No. 71, 1884, p. 94.

Mississippi: "The jury may give such damages as shall be fair and just, with reference to the injury resulting from such death." Code 1892, § 663.

Nevada: "The jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named." Gen. Stats. 1885, § 3899; New Mexico, Comp. Laws 1884, as amended by Laws of 1891, chap. 49, § 2310.

New Jersey: "The jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death." Rev. 1878, p. 294, § 2; Gen. Stats. (vol. 1), p. 1188, § 2.

Vermont: Rev. Laws 1880, § 2139; Wisconsin, Rev. Stats., § 4256.

New York: "Deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death." Banks' Ann. Code Civ. Pro. 1888, § 1904.

North Carolina: Code 1883, § 1499.

North Dakota: "Recover damages in the same manner that the person might have done for any injury where death did not ensue;" recover damages "for the loss or destruction of the life aforesaid."

can award in any case;² while in others no such limitation is specified. The Constitution of Pennsylvania, 1874, article

Comp. Laws Dakota 1887; Const. No. Dak., Schedule, § 2.

South Dakota: Comp. Laws Dak., §§ 5498, 5499, same as No. Dak.

Ohio: "The jury may give such damages as they may think proportioned to the pecuniary injury resulting from such death." Rev. Stats. as amended by Act of April 13, 1880, § 6135.

Pennsylvania: Actions against common carriers, "only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained." 2 Brightly's Purd. Dig., p. 1268, § 7.

Rhode Island: "Damages for the injury caused by the death of such person." Pub. Stats., chap. 204, §§ 15, 20.

Tennessee: "Damages resulting to the parties." Mill & V. Code, § 3134.

Virginia: "The jury may award such damages as to it may seem fair and just." Code 1887, § 2903.

West Virginia: Code, chap. 103, § 6; Wyoming, Rev. Stats. 1887, § 2364b.

Washington: "The jury may give such damages, pecuniary or exemplary, as, under all circumstances of the case, may to them seem just." Hill's Ann. Stats. & Code 1891, § 138 (8).

² Colorado: For death caused by negligence in running any locomotive or car, etc., or any coach or other public conveyance, shall forfeit and pay for every person and passenger so injured a sum not exceeding \$5,000 and not less than

\$3,000. Gen. Stats. 1883, § 1030. For death caused by wrongful act, neglect or default jury may give damages not exceeding \$5,000. Gen. Stats. 1883, § 1032.

Connecticut: Damages not exceeding \$5,000. Gen. Stats. 1888, § 1009.

Illinois: 1 Starr & C. Ann. Stats., chap. 70, § 2.

Maine: Act 1891, chap. 124; Minnesota, Laws of 1891, chap. 123, § 1.

Missouri: Rev. Stats. 1889, § 4425; § 7074, Miners Act.

Nebraska: Comp. Laws 1881, chap. 21, § 2; New Mexico, death caused by negligence of any railroad, stage coach or other public conveyance not exceeding \$5,000. Comp. Laws 1884, as amended by Laws 1891, chap. 49, § 2308.

Oregon: Hill's Code, § 371; Wisconsin, Rev. Stats. 1878, § 4256.

Wyoming: Rev. Stats. 1887, § 2364b.

District of Columbia: Damages not exceeding \$10,000. Act of Congress, Feb. 17, 1885.

Indiana: Rev. Stats. 1881, § 284.

Kansas: Gen. Stats. 1889, par. 4518.

Ohio: Rev. Stats., as amended by Act of April 13, 1880, § 6135.

Oklahoma: Stats. 1890, chap. 70, art. 4, par. 4338.

Utah: Comp. Laws 1888, § 2962.

Virginia: Code 1887, § 2903; West Virginia, Code, chap. 103, § 6.

Maine: If life is lost by negligence of any railroad, steamboat, stage coach or common carrier it shall forfeit not less than \$500 nor more than \$5,000, to be recovered by indictment.

3, section 21, provides that "no act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in case of death from such injuries, the right of action shall survive,³ and the general assembly shall prescribe for whose benefit such actions shall be prosecuted."⁴

§ 254. **Pecuniary loss the basis of damages.**—The principle on which damages are awarded in this class of cases is compensation for the *pecuniary* loss or injury. There must be evidence of pecuniary loss to the survivors or beneficiaries to enable them to recover substantial damages.⁵ Denio, J.: "The word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes,

Massachusetts: Pub. Stats., chap. 112, §§ 212, 213, as amended by Stats. 1883, chap. 243, Pub. Stats., chap. 112, § 213; Stats. 1886, chap. 140, Pub. Stats., chap. 73, § 6; Stats. 1887, chap. 270, as amended by Stats. 1888, chap. 155, and by Stats. 1892, chap. 260. To be assessed with reference to degree of culpability of defendant—life lost by defect of highway—not exceeding \$1,000. Pub. Stats., chap. 52, § 17. prospectively, but the statutory limitation applies in cases of injuries suffered before Jan. 1, 1895. *Isola v. Weber*, 147 N. Y. 329 (1895).⁵ *Tiffany on Death by Wrongful Act*, § 158; *Elliott on Roads & Streets*, p. 655; *Patterson on Railway Accident Law*, § 401; 8 Am. & Eng. Ency. of Law (2d ed.), p. 909; *City of Chicago v. Major*, 18 Ill. 349 (1857); *Baltimore &c. R. R. Co. v. Mahone*, 63 Md. 135 (1884); *Cincinnati Street Ry. Co. v. Altemeier*, Ohio St. ; 6 Am. Neg. Rep. 179 (1899); *Lett v. St. Lawrence &c. Ry. Co.*, 11 Ont. App. 1 (1884); *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539 (1891); *McHugh v. Schloeser*, 159 Pa. St. 480 (1894); *Blake v. Midland Ry. Co.*, 18 Q. B. 93 (1852); 18 Ad. & El. (N. S.) 93; *Telfer v. Northern R. R. Co.*, 1 Vr. 188 (1862); *May v. West Jersey &c. R. R. Co.*, 33 id. 63, 67 (1899); *Chicago &c. R. R. Co. v. Woolridge*, 174 Ill. 330 (1898); *Pepper v. Southern Pacific Co.*, 105 Cal. 389 (1895); *Green v. Southern Pacific Co.*, 122 id. 563 (1898).

Montana: Damages not exceeding \$20,000. Comp. Stats. 1888, p. 911, § 982.

New Hampshire: Damages not exceeding \$7,000. Pub. Stats. 1891, chap. 191, § 11.

³ Means that such right shall survive to the personal representatives of the injured party. Does not apply to the wrongdoer. *Moe v. Smiley*, 125 Pa. St. 136 (1889).

⁴ Arkansas: Const., art. 5. The same provision is in the Arkansas Constitution.

New York: Const. of Jan. 1, 1895, art. 1, § 18. Does not act re-

also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value."⁶ The loss must be such as can be computed or estimated by a money consideration.⁷ The damages are usually estimated upon the basis of the reasonable probabilities of the life of the deceased.⁸ Their measure is the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased.⁹ It is not necessary to show that the deceased was under any legal duty to the next of kin.¹⁰ In some of the States, the statutes do not limit damages for death, to pecuniary injuries only.¹¹

§ 255. Elements of proof to be considered in estimating damages.—The elements of proof, from which an estimation of damages is made, for causing the death of a human being, are many. Consideration should be given to the age of the de-

⁶ *Tilley v. Hudson River R. R. Co.*, 24 N. Y. 471, 476 (1862); 29 id. 252 (1864). Pecuniary loss is not confined to that which the beneficiary was legally entitled to receive, such as loss of service, but does include, in addition thereto, that which it was reasonably probable he would receive, except for the death. *Tiffany on Death by Wrongful Act*, § 159; *City of Vicksburg v. McLean*, 67 Miss. 4 (1889).

⁷ *Demarest v. Little*, 18 Vr. 28 (1885); *Huntingdon &c. R. R. Co. v. Decker*, 84 Pa. St. 419 (1877); *Wynning v. Detroit &c. R. R. Co.*, 59 Mich. 257 (1886); *Louisville &c. R. R. Co. v. Berry*, 96 Ky. 604 (1895); *Walker v. Lake Shore &c. Ry. Co.*, 104 Mich. 606 (1895); *Cincinnati Street Ry. Co. v. Altemeier*, Ohio St. ; 6 Am. Neg. Rep. 179 (1899). But it cannot be confined to any exact mathematical calculation. *Stoher v. St. Louis &c. Ry. Co.*, 91 Mo. 511 (1887).

⁸ *Baltimore &c. R. R. Co. v.*

State, 33 Md. 542 (1870); *Scheffler v. Minneapolis &c. Ry. Co.*, 32 Minn. 518 (1884).

⁹ *Collins v. Davidson*, 19 Fed. Rep. 83 (1883); *Pym v. Great Northern Ry. Co.*, 4 Best & S. 396 (1863), affg. 2 id. 749; *Dalton v. Southeastern Ry. Co.*, 4 C. B. (N. S.) 296 (1858); *Franklin v. Southeastern Ry. Co.*, 3 Hurlst & N. 211 (1858); *Boyden v. Fitchburg R. Co.*, 70 Vt. 125 (1897).

¹⁰ *Lockwood v. New York &c. R. R. Co.*, 98 N. Y. 523 (1885); *Dalton v. Southeastern Ry. Co.*, 4 C. B. (N. S.) 296 (1858); *Boyden v. Fitchburg R. R. Co.*, 70 Vt. 125 (1897).

¹¹ *Connecticut: Gen. Stats.* 1888, § 1032. Just damages not exceeding \$5,000. *Murphy v. New York &c. R. R. Co.*, 29 Conn. 496 (1861); *Goodsell v. Hartford &c. R. R. Co.*, 33 id. 51 (1865).

Tennessee: Mill & V. Code, § 3134. "Damages resulting to the parties."

ceased, the probable duration of life, health, character, occupation, earnings, ability and strength to labor, mental and physical, habits of industry, skill, thrift and expenditures of the deceased; the probable increase or diminution of that ability to earn money with the lapse of time.¹² A succinct, clear and comprehensive statement of this subject was made by Mr. Justice Wood of the Supreme Court of Arkansas, thus: "How is this compensation to be determined? By taking into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or diminution of that ability with the lapse of time; deceased's earning power, rate of wages, and the care and attention which one of his disposition and character may be expected to give his family — all these are proper elements for the consideration of the jury in determining the value of the life taken. From the amount thus ascertained, the personal expenses of the deceased should be deducted, and the balance, reduced to its present value, should be the amount of the verdict."¹³

§ 256. **Standard mortuary tables as evidence.**—Evidence of the probable duration of the life of the deceased may be shown by the standard mortuary tables. For this purpose they are admissible in evidence;¹⁴ such as the Carlisle, Northampton,

¹² *McHugh v. Schloeser*, 159 Pa. St. 480 (1894). There are many reported cases in which this question is discussed, the following among others: *Burton v. Wilmington &c. R. R. Co.*, 82 No. Car. 504 (1880); *Kesler v. Smith*, 66 id. 154 (1872); *James v. Richmond &c. R. R. Co.*, 92 Ala. 231 (1890); *Castello v. Landwehr*, 28 Wis. 522 (1871); *Telfer v. Northern R. R. Co.*, 1 Vr. 188 (1862, N. J.); *Demarest v. Little*, 18 id. 28 (1885); *De Voe v. Van Vracken*, 29 Hun, 201 (1883); *Baltimore &c. R. R. Co. v. Kelly*, 24 Md. 271 (1865); *Donaldson v. Mississippi &c. R. R. Co.*, 18 Iowa, 280 (1865); *Brown v. Chicago &c. Ry. Co.*, 64 id. 652 (1884); *Cincinnati Street Ry. Co. v. Altemeier*, Ohio St. ; 6 Am. Neg. Rep. 179 (1899).
¹³ *Wood, J.*, in *St. Louis &c. Ry. Co. v. Sweet*, 60 Ark. 550, 558 (1895). See a strong discussion of this subject by *Burket, J.*, in *Cincinnati Street Ry. Co. v. Altemeier*, Ohio St. ; 6 Am. Neg. Rep. 179 (1899).
¹⁴ See § 211; *Tiffany on Death by Wrongful act*, § 174. "An accountant" may prove the "Carlisle Tables." *Rowley v. London &c. Ry. Co.*, L. R., 8 Exch. 221 (1873); *Sauter v. New York &c. R. R. Co.*, 66 N. Y. 50 (1876); *Schell v. Plumb*, 55 id. 592 (1874); *Donaldson v. Mississippi &c. R. R. Co.*, 18 Iowa, 280 (1865); *McDonald v. Chicago &c. R.*

English and other standard tables. They establish a fixed criterion of damages, although they are not conclusive;¹⁵ or absolutely essential, although they may be useful.¹⁶ They must be proved to be authentic and their character and office should be explained to the jury.¹⁷ The present net moneyed value of the intestate's life to those dependent upon him, had he lived, is the basis of calculation.¹⁸

§ 257. **Damages cannot be given as a solatium.**— Nothing can be given or allowed by way of *solatium*, for the grief and wounded feelings of the beneficiaries.¹⁹ Otherwise in Vir-

R. Co., 26 Iowa, 124 (1868); Cooper v. Lake Shore &c. Ry. Co., 66 Mich. 261 (1887). Tables given in local statutes. Hunn v. Michigan Cent. R. R. Co., 78 Mich. 513 (1889). "Northampton Tables of Mortality." Georgia &c. Co. v. Oaks, 52 Ga. 410 (1874); Savannah &c. Ry. Co. v. Stewart, 71 id. 427 (1883); Georgia R. R. Co. v. Pittman, 73 id. 325 (1884); Central R. R. Co. v. Crosby, 74 id. 737 (1885); Central R. R. Co. v. Thompson, 76 id. 770 (1886); Steinbrunner v. Pittsburgh &c. Ry. Co., 146 Pa. St. 504 (1891). Tables prepared by the American Legion of Honor, admissible. San Antonio &c. Ry. Co. v. Bennett, 76 Tex. 151 (1890); O'Mellia v. Kansas City &c. R. R. Co., 115 Mo. 205 (1893).

¹⁵ Central R. R. Co. v. Crosby, 74 Ga. 737 (1885); Camden &c. R. Co. v. Williams, 32 Vr. 646 (1898).

¹⁶ Savannah &c. Ry. Co. v. Stewart, 71 Ga. 427 (1883); Boswell v. Barnhart, 96 Ga. 521 (1895); Deisen v. Chicago &c. Ry. Co., 43 Minn. 454 (1890); Nelson v. Lake Shore &c. Ry. Co., 104 Mich. 582 (1895); Gulf &c. Ry. Co. v. Compton, 75 Tex. 667 (1890).

¹⁷ Camden &c. R. R. Co. v. Williams, 32 Vr. 646 (1898).

¹⁸ Pickett v. Wilmington &c. R. Co., 117 No. Car. 616 (1895).

¹⁹ Blake v. Midland Ry. Co., 18 Q. B. 93 (1852); 18 Ad. & E. (N. S.) 93 (1852); Louisville &c. Ry. Co. v. Rush, 127 Ind. 545 (1890); Pennsylvania R. R. Co. v. Butler, 57 Pa. St. 335 (1868); Canadian Pac. Ry. Co. v. Robinson, 14 Can. Sup. Ct. 105 (1887); Chicago &c. R. R. Co. v. Harwood, 80 Ill. 88 (1875); Donaldson v. Mississippi R. R. Co., 18 Iowa, 280 (1865); Chicago &c. R. R. Co. v. Morris, 26 Ill. 400 (1861); City of Chicago v. Scholton, 75 id. 468 (1874); Telfer v. Northern R. Co., 1 Vr. 188 (1862, N. J.); Castello v. Landwehr, 28 Wis. 522 (1871); March v. Walker, 48 Tex. 372 (1877); James v. Richmond &c. R. R. Co., 92 Ala. 231 (1890); Parsons v. Missouri Pacific Ry. Co., 94 Mo. 286 (1887); McHugh v. Schloeser, 159 Pa. St. 480 (1894); Pym v. Great Northern Ry. Co., 4 Best & S. 396 (1863); Tiffany on Death by Wrongful Act, § 154, and cases cited. Otherwise under the Scotch law. Patterson v. Wallace, 1 Macq. H. L. Cas. 748 (1854). So, formerly, it was held in Quebec. Canadian Pac. Ry. Co. v. Robinson, 14 Can. Sup. Ct. 105 (1887).

ginia.²⁰ Nothing can be given as damages for lacerated feelings or disappointed hopes;²¹ or for the loss of society of the deceased.²² In California it was held, that the loss of society, comfort and care can only be considered for the purpose of estimating the pecuniary loss.²³

§ 258. Injury to deceased — Physical and mental suffering.—

Nothing can be given or allowed for injury to the deceased, or for the physical or mental suffering of the deceased.²⁴ Other-

²⁰ *Baltimore &c. R. R. Co. v. Pacific &c. Co.*, 84 Cal. 515 (1890); *Noell*, 32 Gratt. 394, 404 (1879); *Pepper v. Southern Pac. R. R. Co.*, 105 id. 389 (1895); *Green v. Southern Pacific Co.*, 122 id. 563 (1898).
²¹ *Simmons v. McConnell*, 86 Va. 494 (1890).

²² *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. St. 372 (1858); *Blake v. Midland Ry. Co.*, 18 Q. B. 93, 110 (1852); 18 Ad. & E. (N. S.) 93, 110 (1852); *Nelson v. Lake Shore &c. Ry. Co.*, 104 Mich. 582 (1895); *McGown v. International &c. Ry. Co.*, 85 Tex. 289 (1892); *Cincinnati Street Ry. Co. v. Altemeier*, Ohio St. ; 6 Am. Neg. Rep. 179 (1899).

²³ *Donaldson v. Mississippi &c. R. R. Co.*, 18 Iowa, 280 (1865); *Blake v. Midland Ry. Co.*, 18 Q. B. 93 (1852); 18 Ad. & E. (N. S.) 93 (1852); *Pym v. Great Northern Ry. Co.*, 4 Best & S. 396 (1863); *McGown v. International &c. Ry. Co.*, 85 Tex. 289 (1892). Formerly, in Indiana, compensation could be given for the loss of society and companionship of the deceased. *Louisville &c. Ry. Co. v. Rush*, 127 Ind. 545 (1890). So in California. *Beeson v. Green &c. Co.*, 57 Cal. 20 (1880). Mental anguish and suffering of the parents. *Cleavy v. City R. R. Co.*, 76 Cal. 240 (1888). Overruled. *Morgan v. Southern Pac. R. R. Co.*, 95 Cal. 510 (1892); 30 Pac. Rep. 603 (1892); *Munro v. R. R. Co.*, 92 Ala. 231 (1890).

²⁴ *Green v. Southern Pacific Co.*, 122 Cal. 563 (1898). So injury claimed to arise by the deprivation of such services and counsel as a father might probably give to his children, must be limited to such services and counsel as would be of pecuniary advantage, and must be determined with careful reference to the age, condition and relations of the parties. *Demarest v. Little*, 18 Vr. 28 (1885).

²⁴ *Tiffany on Death by Wrongful Act*, § 156; *Sweetland v. Chicago &c. Ry. Co.*, Mich. ; 43 L. R. A. 568 (1898); *Franklin v. Southeastern Ry. Co.*, 3 Hurl. & N. 211 (1858); *Donaldson v. Mississippi &c. R. R. Co.*, 18 Iowa, 280 (1865); *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. St. 372 (1858). Or any injury which is not susceptible of being compensated by a money consideration. *Wynning v. Detroit &c. R. R. Co.*, 59 Mich. 257 (1886); *State v. Baltimore &c. R. R. Co.*, 24 Md. 84 (1865); *Baltimore &c. Turnpike Road v. State*, 71 id. 573 (1889); *Long v. Morrison*, 14 Ind. 595 (1860); *James v. Richmond &c. R. R. Co.*, 92 Ala. 231 (1890).

wise in Connecticut;²⁵ New Hampshire;²⁶ and Tennessee²⁷ by statute. By statute in New Brunswick the jury may consider any expenses incurred or pecuniary loss sustained prior to the death, by the person injured and in consequence of such injury.²⁸ In Georgia the full value of the life of the deceased as shown by the evidence may be recovered, which shall be held to mean "without any deduction for necessary or other personal expenses of the deceased had he lived."²⁹ In Kentucky, by statute, the personal representative may "recover damages in the same manner that the person himself might have done for any injury where death did not ensue."³⁰ In Pennsylvania it

²⁵ *Murphy v. New York &c. R. R. Co.*, 29 Conn. 496 (1861); 30 id. 184 (1861); *Goodsell v. Hartford &c. R. R. Co.*, 33 id. 51 (1865); *Waldo v. Goodsell*, id. 432 (1866); *Lamphear v. Buckingham*, id. 237 (1866); *Carey v. Day*, 36 id. 152 (1869).

²⁶ "The mental and physical pain suffered by him in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money, may be considered as elements of damage, in connection with other elements allowed by law." Pub Stats. 1891, chap. 191, § 12.

²⁷ "For the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries." Mill & V. Code, § 3134. Contributory negligence may be shown in mitigation of damages. *Louisville &c. R. R. Co. v. Burke*, 6 Coldw. 45 (1868); *Nashville &c. R. R. Co. v. Smith*, 6 Helsk. 174 (1871); *Louisville &c. R. R. Co. v. Howard*, 90 Tenn. 144 (1891); *Louisville &c. R. Co. v. Stacker*, 86 Tenn. 343 (1887).

²⁸ Cons. Stats., chap. 86, § 3.

²⁹ Code 1892, § 2971, as amended by Laws of 1887, No. 588, p. 43. See *Georgia R. R. Co. v. Pittman*, 73 Ga. 325 (1884). Before that amendment such expenses were deducted.

³⁰ Ky. Gen. Stats., chap. 57, § 1; *Louisville &c. R. R. Co. v. Case*, 9 Bush, 728 (1873); *Kentucky Central R. R. Co. v. Gastineau*, 83 Ky. 119 (1885). Under these statutes the same cause of action which the deceased had is made to survive in favor of representatives.

Delaware: Code, p. 644. In a suit begun by the deceased in his lifetime and continued after his death by his administrator. *Quinn v. Johnson Forge Co.*, 9 Houst. 338 (1892).

New Hampshire: Laws of N. H., 1891, chap. 191; Act of July 18, 1879. Suffering of deceased may be recovered for. *Clark v. Manchester*, 62 N. H. 577 (1883); *Corliss v. Worcester &c. R. R. Co.*, 63 id. 404 (1885). Section 5498, Comp. Laws of South Dakota, is a survival statute. See *Belding v. Black Hills &c. R. R. Co.*, 3 So. Dak. 369 (1892).

was held, that when the plaintiff has died, and the action has survived to his personal representatives, by virtue of section 18 of the act of April 15, 1851 (P. L. 674), recovery may be had, not only for the mental and physical suffering up to the time of the plaintiff's death and diminution of earning power during a period of life, which he would have probably lived had the accident not happened; but also for the value of the life.³¹

§ 259. **Exemplary — Punitive — Damages — Statutes.**— In some of the States the statute expressly permits exemplary, as well as actual damages to be awarded by the jury.³² But, gen-

³¹ *Mahe v. Philadelphia Traction Co.*, 181 Pa. St. 391 (1897).

³² *Arizona*: "When the death is caused by the wilful act or omission or gross negligence of the defendant, exemplary, as well as actual, damages may be recovered." Rev. Stats. 1887, § 2147.

Texas: Sayles' Civil Stats., art. 2901; Const. 1876, art. 16, § 26, provides that if a homicide be committed "through wilful act or omission, or gross neglect," exemplary damages may be given. *International &c. Ry. Co. v. McDonald*, 75 Tex. 41 (1889); *id.* 667 (1890).

Kentucky: If life is lost by "wilful neglect," may recover "*punitive* damages." Gen. Stats., chap. 57, § 3. Person killed in a duel, action lies against principal, seconds, etc.; jury may give "*vindictive* damages." Gen. Stats., chap. 32, § 1; *Kentucky &c. Co. v. Gastineau*, 83 Ky. 119 (1885); *Louisville &c. R. R. Co. v. Brooks*, *id.* 129 (1885).

Michigan: Stats. 1883, No. 191; *Larzelere v. Kirchgessner*, 73 Mich. 276 (1889).

Missouri: Rev. Stats. 1889, § 4427; *Gray v. McDonald*, 104 Mo. 303 (1891).

Nevada: The jury may give dam-

ages, "*pecuniary and exemplary*." Gen. Stats. 1885, § 3899.

New Mexico: The jury may give damages "*compensatory and exemplary*." Comp. L. 1884, as amended by Laws 1891, chap. 49, § 2310.

Washington: The jury may give "such damages, pecuniary or exemplary, as, under all circumstances of the case, may to them seem just." Hill's Ann. Stats. & Code, 1891, § 138 (8); *Klepsch v. Donald*, 4 Wash. St. 436 (1892). Not in *Louisiana*. *Hamilton v. Morgan &c. SS. Co.*, 42 La. Ann. 824 (1890). Under the original *California Act*, exemplary damages were expressly provided for. *Myers v. City of San Francisco*, 42 Cal. 215 (1871). Not allowed by the present statute. *Lange v. Schoettler*, 115 Cal. 388 (1896).

Alabama: Code 1886, § 2589. "Such damages as the jury may assess;" punitive damages may be allowed. *Savannah &c. R. R. Co. v. Shearer*, 58 Ala. 672 (1877); *Richmond &c. R. R. Co. v. Freeman*, 97 *id.* 289 (1893). Otherwise under the *Employers' Liability Act*, § 2591. *Louisville &c. R. R. Co. v. Orr*, 91 Ala. 548 (1890); *James v. Richmond &c. R. R. Co.*, 92 *id.* 231 (1890).

erally speaking, in the absence of a statute, punitive, vindictive or exemplary damages cannot be given by the jury;³³ otherwise in Connecticut;³⁴ and Tennessee.³⁵ In Virginia the jury, by statute, "may award such damages as to it may seem fair and just."³⁶

§ 260. **Funeral expenses — Family mourning.**—In England it has been held, that the funeral expenses of the deceased cannot be recovered, under the statute, as part of the damages;³⁷ or the expenses of family mourning.³⁸ In California it was held, that such expenses are not recoverable, except as special damages, and if recoverable at all, they must be specially pleaded.³⁹ The rule, which seems to have the weight of authority to support it, is that such funeral expenses are recoverable as part of the damages where any of those, for whose benefit the action is brought, are legally bound to pay such expenses; proof thereof is, therefore, competent;⁴⁰ so held, when the action was brought by a parent for causing the death of a minor child.⁴¹ In Pennsylvania it was held, in an action by a mother for causing the death of her son, that the expenses of nursing and medical at-

³³ See § 243; *Tiffany on Death by Wrongful Act*, § 155; *Lange v. Schoettler*, 115 Cal. 388 (1896); *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339 (1868); *Cleveland & C. R. Co. v. Rowan*, 66 id. 393 (1870).

³⁴ *Murphy v. New York & C. R. Co.*, 29 Conn. 496 (1861).
³⁵ *Haley v. Mobile & C. R. R. Co.*, 7 Baxt. 239 (1874); *Kansas City & C. R. Co. v. Daughtry*, 88 Tenn. 721 (1890).
³⁶ Code 1887, § 2903; *Matthews v. Warner*, 29 Gratt. 570 (1877). See § 243.

³⁷ *Dalton v. Southeastern Ry. Co.*, 4 C. B. (N. S.) 296 (1858); followed in *Consolidated Traction Co. v. Hone*, 31 Vr. 444 (1897), reversing, on this point, 30 id. 275 (1896).
³⁸ *Dalton v. Southeastern Ry. Co.*, 4 C. B. (N. S.) 296 (1858).

³⁹ *Gay v. Winter*, 34 Cal. 153 (1867).
⁴⁰ *Tiffany on Death by Wrongful Act*, § 157; *Murphy v. New York & C. R. Co.*, 88 N. Y. 445 (1882); *Consolidated Traction Co. v. Hone*, 30 Vr. 275 (1896); reversed, 31 Vr. 444; *Pennsylvania Co. v. Lilly*, 73 Ind. 252 (1881); *Petrie v. Columbia & C. R. R. Co.*, 29 So. Car. 303 (1888); *Gulf & C. R. Co. v. Southwick*, Tex. Civ. App. ; 30 S. W. Rep. 592 (1895); *Cleveland & C. R. Co. v. Rowan*, 66 Pa. St. 393 (1870).
⁴¹ *Owen v. Brockschmidt*, 54 Mo. 285 (1873); *Rains v. St. Louis & C. Ry. Co.*, 71 id. 164 (1879); *Pennsylvania R. R. Co. v. Bantom*, 54 Pa. St. 495 (1867); *Augusta Factory v. Davis*, 87 Ga. 648 (1891); *Little Rock & C. Ry. Co. v. Barker*, 33 Ark. 250 (1878).

tendance, before the death, could be recovered as part of the damages.⁴²

§ 261. **Mitigation of damages — Insurance money.**— It is no defense to the action, under the statute, that the life of the deceased was insured;⁴³ hence, the recovery of insurance money on the life destroyed by the defendant's negligence, cannot be shown by the defendant for the purpose of diminishing damages.⁴⁴ Nor can a provision of law whereby the widow and children might, under certain conditions, receive a government pension in consequence of the husband's death, be considered in mitigation of damages.⁴⁵ Money expended by the defendant for the injured person between the time of the injury and the death, cannot be shown, in an action for the death, for the purpose of diminishing the damages.⁴⁶

§ 262. **Nominal damages.**— A verdict for nominal damages for the death of a human being is inadequate.⁴⁷ Evidence of the bare killing and age of an employe justifies only nominal damages,⁴⁸ but otherwise when there was proof of his wages.⁴⁹ So when the life of a person killed was not shown to be of any pecuniary value to his next of kin, nominal damages may be recovered.⁵⁰ Lineal kindred of deceased are entitled to, at

⁴² *Pennsylvania R. R. Co. v.* (1885); *Sherlock v. Alling*, 44 Ind. Bantom, 54 Pa. St. 495 (1867); 184 (1873).
⁴³ *Cleveland &c. R. R. Co. v. Rowan*, 66 id. 393 (1870).
⁴⁴ *Carroll v. Missouri Pacific Ry. Co.*, 88 Mo. 239 (1885); *Grand Trunk Ry. Co. v. Jennings*, L. R., 13 App. Cas. 800 (1888).

⁴⁵ *Murray v. Usher*, 46 Hun, 404 (1887); 117 N. Y. 542 (1889), distinguishing *Littlewood v. Mayor &c. New York*, 89 id. 24 (1882).
⁴⁶ See *Holland v. Brown*, 35 Fed. Rep. 43 (1888).

⁴⁷ *Wolford v. Lyon Gravel &c. Co.*, 63 Cal. 483 (1883).
⁴⁸ *Louisville &c. R. R. Co. v. Orr*, 91 Ala. 548 (1890).
⁴⁹ *James v. Richmond &c. R. R. Co.*, 92 Ala. 231 (1890).
⁵⁰ *Atchison &c. R. R. Co. v. Weber*, 33 Kan. 543 (1885).

least, nominal damages, without proof of loss of support.⁵¹ But in England,⁵² and in some of the States nominal damages cannot be recovered.

§ 263. **Question of fact for the jury.**— Much must be left to the discretion and judgment of the jury within the limits of the statute. It is not improper to instruct them to that effect.⁵³ Their finding will not be disturbed, unless it is such as to show that the verdict was the result of prejudice or passion.⁵⁴ As was said by Judge Earl of the New York Court of Appeals, “the courts have found it impossible to lay down any definite guide for the jury in estimating damages under the act.”⁵⁵

§ 264. **Seven classes of cases.**— There may arise seven classes of cases, in actions brought to recover damages for causing the death of human beings under the statute: *First*. When the action is brought by a wife, to recover damages for causing the death of her husband. *Second*. When the action is brought by a husband, to recover damages for causing the death of his wife. *Third*. When the action is brought by a parent, to recover damages for causing the death of a minor child. *Fourth*. When the action is brought by a parent, to recover damages for causing the death of an adult child. *Fifth*. When the action is brought on behalf of a minor child, to recover damages for

⁵¹ Chicago &c. R. R. Co. v. Gunderson, 174 Ill. 495 (1898). See Al-
berts v. Bache, 69 Hun, 255 (1893);
O'Neill v. Brooklyn Heights R. R.
Co., 71 id. 114 (1893). Houghkirk v. Delaware &c. Canal
Co., 92 N. Y. 219, 224 (1883); Chi-
cago &c. R. R. Co. v. Sweet, 45 Ill.
197 (1867).

⁵² Duckworth v. Johnson, 4
Hurlst. & N. 653 (1859). ⁵⁴ Parsons v. Missouri Pacific
Ry. Co., 94 Mo. 286 (1887); Kane v.
Mitchell Transp. Co., 90 Hun, 65
(1895); 35 N. Y. Supp. 581.

Michigan: Hurst v. Detroit &c.
Ry. Co., 84 Mich. 539 (1891). ⁵⁵ Lockwood v. New York &c. R.
R. Co., 98 N. Y. 523 (1885); An-
drews v. Chicago &c. Ry. Co., 86

Texas: McGown v. International
&c. Ry. Co., 85 Tex. 289 (1892). Iowa, 677 (1892). “It is impossi-
ble to lay down any well-defined
rule to guide courts and juries in
determining what pecuniary dam-
ages, if any, the next of kin sus-
tain in these negligence cases.”
Kane v. Mitchell Transp. Co., 90
Hun, 65; 35 N. Y. Supp. 581 (1895).

⁵³ Tiffany on Death by Wrongful
Act, § 177; Illinois Central R. R.
Co. v. Barron, 5 Wall. 90, 105
(1866); Parsons v. Missouri Pacific
Ry. Co., 94 Mo. 286 (1887); Chicago
&c. R. R. Co. v. Shannon, 43 Ill.
338 (1867); Frank v. New Orleans
&c. R. R. Co., 20 La. Ann. 25 (1868);

causing the death of a parent. *Sixth.* When the action is brought by an adult, to recover damages for causing the death of a parent. *Seventh.* When the action is brought by the beneficiaries, to recover damages for causing the death of collateral relatives. The principle underlying the assessment of damages in all these cases, and which is common to them all, is compensation for the pecuniary loss sustained by the death,⁵⁶ although the evidence admissible to prove the pecuniary loss, at the trial of each class, may be somewhat different. So the statute of each jurisdiction may enlarge or restrict the scope of the evidence that may be admissible at the trial in each class of cases. The statutes of all the States do not extend to injuries suffered in all the above enumerated classes of cases; so that an action will lie to recover damages therefor. Thus, in New Jersey the statute of that State does not extend to an injury suffered by a husband as the result of the immediate killing of his wife. An action will not lie in that State to recover damages therefor.⁵⁷

§ 265. Action by wife for causing death of husband — Wife living in open adultery — Divorce.—When the action is brought by a wife, to recover damages for causing the death of her husband, the basis of compensation is the loss of support, which the deceased owed her.⁵⁸ Damages for the widow's sorrow

⁵⁶ This loss, it is said by Mr. Tiffany, in his valuable work on *Death by Wrongful Act*, § 159, "may be either the loss, *first*, of something which the person was legally entitled to receive, or, *second*, it may be the loss of something which it was merely reasonably probable the person would receive. The first description of loss is principally confined to a husband's loss of his wife's services, a wife's loss of her husband's support and services, a parent's loss of the services of a minor child, and a minor child's loss of the support of a parent. The second description of loss may be divided into: *First*, losses of prospective gifts; and *second*, losses of prospective inheritances. The loss sustained by a husband, wife, minor child, and parent of a minor child may be of both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative can only be of the latter description."

⁵⁷ *Grosso v. Delaware & C. R. R. Co.*, 21 Vr. 317 (1888). *Contra*, under the Illinois statute. *Cleveland & C. R. R. Co. v. Baddeley*, 150 Ill. 328 (1894).

⁵⁸ *Hayes v. Williams*, 17 Colo. 465 (1892). The measure of damages is the amount of money which the deceased would probably have earned during his life, for her

cannot be considered;⁵⁹ nor the mental and physical suffering of the widow;⁶⁰ nor the fact that she has been deprived of his solace, comfort and affection.⁶¹ Evidence of the dependence of the wife upon her husband for support is competent.⁶² She may prove the number and ages of the children to show the burden cast upon her by her husband's death.⁶³ In Wisconsin it was held that a widow may show that she has no means of support except that which her husband furnished her;⁶⁴ or that young children are in poor health and have no means of support of their own.⁶⁵ In Maryland it was held, that the jury may consider the probable duration of their joint lives when the injury occurred.⁶⁶ The subsequent marriage of the widow cannot affect the measure of damages;⁶⁷ nor the fact that the widow has a policy of insurance on her husband's life.⁶⁸ A

benefit, taking into consideration his age, ability and disposition to work, and habits of living and expenditure. *Tiffany on Death by Wrongful Act*, § 160.

⁵⁹ *Chicago &c. Ry. Co. v. Gillam*, 27 Ill. App. 386 (1888).

⁶⁰ *Railroad Co. v. Wynick*, 99 Tenn. 500 (1897).

⁶¹ *Gulf &c. Ry. Co. v. Finley*, 11 Tex. Civ. App. 64 (1895); *Walker v. McNeill*, 17 Wash. St. 582 (1897). See *Wells v. Denver &c. Ry. Co.*, 7 Utah, 482 (1891).

⁶² *Pennsylvania Co. v. Keane*, 143 Ill. 172 (1892); *Chicago &c. R. R. Co. v. May*, 108 id. 288 (1884).

⁶³ *Abbot v. McCadden*, 81 Wis. 563 (1892); *Tetherow v. St. Joseph &c. R. R. Co.*, 98 Mo. 74 (1888). "We take it that the rule deducible from the cases is substantially this: That it is not competent to show what the pecuniary circumstances of the widow, family, or next of kin are, or have been, since the decease of the intestate, but that it is competent to show that the wife, children, or next of kin were dependent upon him for support before and at the time of his

death. This view is in consonance with the statute that gives the action, and which provides that such damages shall be given as are a fair and just compensation for the pecuniary injuries resulting from the death to the wife and next of kin of the deceased person." *Mr. Justice Baker in Pennsylvania Co. v. Keane*, 143 Ill. 172, 175 (1892). See *Tiffany on Death by Wrongful Act*, § 173; *Chicago &c. Ry. Co. v. Moranda*, 93 Ill. 302 (1879). Compare *Central R. R. Co. v. Moore*, 61 Ga. 151 (1879); *Lockwood v. New York &c. R. R. Co.*, 98 N. Y. 523 (1885).

⁶⁴ *Annas v. Milwaukee &c. R. R. Co.*, 67 Wis. 46 (1886). *Contra*, *Chicago &c. Ry. Co. v. Moranda*, 93 Ill. 302 (1879).

⁶⁵ *McKeigue v. City of Janesville*, 68 Wis. 50 (1887).

⁶⁶ *Baltimore &c. Turnpike Co. v. Grimes*, 71 Md. 573 (1889).

⁶⁷ *Georgia R. R. &c. Co. v. Garr*, 57 Ga. 277 (1876).

⁶⁸ *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15 (1879); *Althorff v. Wolfe*, 22 N. Y. 355 (1860); *Kellogg v. New York Central &c.*

widow who, at and before her husband's death, was living apart from him in open adultery cannot recover damages;⁶⁹ nor when there has been a divorce.⁷⁰

§ 266. **Action by husband for causing death of wife—Re-marriage of husband.**— When the action is brought by a husband, to recover damages for causing the death of his wife, the pecuniary injury to the husband resulting from the death of his wife includes the loss of her services. The measure of damages is their reasonable value.⁷¹ It is the excess in pecuniary value of the wife's services, over the cost of suitably maintaining her.⁷² In some States the loss of a wife's society may be included.⁷³ Under the Illinois statute, the husband may recover for the pecuniary injury resulting to him as husband, from his wife's death.⁷⁴ He need not show that he suffered pecuniary loss on account of his wife's death.⁷⁵ It is not proper to show that the

R. R. Co., 79 id. 72 (1879). See §§ 259, 261. Amount of policy not to be deducted from the damages. *Grand Trunk Ry. Co. v. Jennings*, L. R., 13 App. Cas. 800 (1888). Case of pension. See *St. Louis & C. Ry. Co. v. Maddy*, 57 Ark. 306 (1893).

⁶⁹ *Stimpson v. Wood*, 57 L. J. Q. B. 484 (1888); 59 L. T. 218. In a house of prostitution. *Fort Worth & C. Ry. Co. v. Floyd*, Tex. Civ. App. ; 21 S. W. Rep. 544 (1893).

⁷⁰ See §§ 115, 135.

⁷¹ *Tiffany on Death by Wrongful Act*, § 163; *Nelson v. Lake Shore & C. Ry. Co.*, 104 Mich. 582 (1895). In such cases not necessary to prove special damages. *Delaware & C. R. R. Co. v. Jones*, 128 Pa. St. 308 (1889).

⁷² *Gulf & C. Ry. Co. v. Southwick*, Tex. Civ. App. ; 30 S. W. Rep. 592 (1895). The husband is not entitled to damages for the cost of nursing a deceased wife, when there was no evidence of the value of the nurse's services.

⁷³ *New York: Cregin v. Brooklyn & C. R. R. Co.*, 83 N. Y. 595 (1881).

Utah: Action by widow for the death of husband. *Wells v. Denver & C. Ry. Co.*, 7 Utah, 482 (1891). *Contra*, Missouri: *Schaub v. Hannibal & C. R. R. Co.*, 106 Mo. 74 (1891); *Atchison & C. R. R. Co. v. Wilson*, 4 U. S. App. 25; 48 Fed. Rep. 57 (1891).

⁷⁴ *Cleveland & C. R. R. Co. v. Baddeley*, 150 Ill. 328 (1894). The statute gives the action in favor of the husband as well as the wife.

⁷⁵ *Delaware & C. R. R. Co. v. Jones*, 128 Pa. St. 308 (1889). In an action by husband, as administrator of his wife, who was killed by the defendant's negligence, leaving children, it was held: (1) The jury might consider the nurture, instruction, physical, moral and intellectual training which the mother gave to the children; (2) the damages were not necessarily confined to the children's minority if the jury are legally persuaded that they will continue after that age; (3) the prospective losses might be considered; (4) the business capacity of the mother may

husband is again married;⁷⁶ or that he is engaged to be married.⁷⁷ In New Jersey, the statute does not extend to injuries suffered by a husband, as the result of the immediate killing of his wife.⁷⁸

§ 267. **Action by parent for causing death of minor child — Question for the jury.**— When the action is brought by a parent, to recover damages for causing the death of a minor child, the principle on which damages are awarded under the statute, is compensation for the actual pecuniary loss sustained, on the theory of a parent's right to the services of the child during minority.⁷⁹ The measure of recovery is said to be the value of the child's services from the time of the injury until he would have attained his majority, in connection with his prospects in life. Necessary expenses, such as medical and nursing, attending the injury, and funeral expenses incurred for a proper burial;⁸⁰ less support and maintenance.⁸¹ In some of the States it is held, that the jury in estimating damages is not

be considered as aiding the jury in determining the pecuniary benefit which the mother was to her children, and as to her capacity to give them such training and education as would be pecuniarily serviceable to them in after life. The habitual employment and value of the earnings of the mother were competent to show general capacity. *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 252 (1864); 24 id. 471 (1862). In a suit by husband as administrator of his wife, the value of her services to him does not enter into the estimate of damages, and evidence thereof is inadmissible. *Dickins v. New York Central R. R. Co.*, 23 N. Y. 158 (1861).

⁷⁶ *Georgia R. R. & Co. v. Garr*, 57 Ga. 277 (1876); *Davis v. Guarnieri*, 45 Ohio St. 470 (1887).

⁷⁷ *Dimmey v. Wheeling & C. R. R. Co.*, 27 W. Va. 32 (1885).

⁷⁸ *Grosso v. Delaware & C. R. R.*

Co., 21 Vr. 317 (1888). *Contra*, under the Illinois statute. *Cleveland & C. R. R. Co. v. Baddeley*, 150 Ill. 328 (1894).

⁷⁹ *Mobile & C. R. R. Co. v. Watly*, 69 Miss. 145 (1891); *Pierce v. Conners*, 20 Colo. 178 (1894).

⁸⁰ See § 260.

⁸¹ *Mayhew v. Burns*, 103 Ind. 328, 334 (1885); *Pennsylvania Co. v. Lilly*, 73 id. 252 (1881); *Benton v. Chicago & C. R. R. Co.*, 55 Iowa, 496 (1881); *Walters v. Chicago & C. R. R. Co.*, 36 id. 458 (1873); *Rains v. St. Louis & C. R. R. Co.*, 71 Mo. 164 (1879); *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95 (1882); *Pennsylvania R. R. Co. v. Kelly*, 31 id. 372, 379 (1858); *Pennsylvania R. R. Co. v. Zebe*, 33 id. 318 (1858); *Rockford & C. R. R. Co. v. Delaney*, 82 Ill. 198 (1876); *Cooper v. Lake Shore & C. Ry. Co.*, 66 Mich. 261 (1887).

confined to the loss of services during minority.⁸² When the evidence shows a reasonable expectation of pecuniary benefit from the continuance of the life beyond minority,⁸³ and the child had manifested an intent to aid the parents after that time.⁸⁴ The question whether there would be a financial profit in bringing up the child in a city and without a home is for the jury.⁸⁵ So the question whether decedent would have continued to contribute to the support of his parents, after attaining his majority, is for the jury.⁸⁶ In an action by a

⁸² Illinois: Illinois Cent. R. R. Co. v. Slater, 129 Ill. 91 (1889); Missouri: Parsons v. Missouri

West Chicago &c. R. R. Co. v. Dooley, 76 Ill. App. 424 (1898). Pennsylvania: Pennsylvania R.

New York: Birkett v. Knickerbocker Ice Co., 110 N. Y. 504 (1888). R. Co. v. Zebe, 33 Pa. St. 318 (1858); Caldwell v. Brown, 53 id. 453 (1866); Lehigh Iron Co. v. Rupp, 100 id. 95 (1882).

Texas: Gulf &c. Ry. Co. v. Compton, 75 Tex. 667, 674 (1890). ⁸³ Johnson v. Chicago &c. Ry.

Wisconsin: Thompson v. Johnston Bros. Co., 86 Wis. 576 (1893); Chicago &c. Ry. Co., 38 id. 613 (1875). In Potter v. Chicago &c. Ry. Co., 21 Wis. 372 (1867), it was said the pecuniary advantage of the life of the deceased after his minority can be considered, only after proof of the indigent or dependent condition of the parents. Bir-

Contra, Arkansas: Little Rock &c. Ry. Co. v. Barker, 33 Ark. 350 (1878); St. Louis &c. Ry. Co. v. Freeman, 36 id. 41 (1880); distinguished, St. Louis &c. Ry. Co. v. Davis, 55 id. 462 (1892). *Contra*, Atchison &c. R. R. Co. v. Cross, 58 id. 424 (1897). kett v. Knickerbocker Ice Co., 110 N. Y. 504 (1888); Keenan v. Brooklyn City R. R. Co., 145 N. Y. 348 (1895); 5 App. Div. 121.

Georgia: Augusta Factory v. Davis, 87 Ga. 648 (1891). ⁸⁴ St. Louis &c. Ry. Co. v. Davis, 55 Ark. 462 (1892); distinguished from Little Rock &c. Ry. Co. v. Barker, 33 id. 350 (1878); St. Louis &c. Ry. Co. v. Freeman, 36 id. 41 (1880).

Maryland: State v. Baltimore &c. R. R. Co., 24 Md. 84 (1865); Agricultural &c. Assn. v. State, 71 id. 86 (1889); Baltimore &c. Turnpike Co. v. Grimes, id. 573 (1889). ⁸⁵ A child eleven years old. Citizens Street Ry. Co. v. Lowe, 12 Ind. App. 47 (1894).

Michigan: Cooper v. Lake Shore &c. Ry. Co., 66 Mich. 261 (1887); Hurst v. Detroit City Ry. Co., 84 id. 539 (1891). ⁸⁶ St. Louis &c. R. R. Co. v. Davis, 55 Ark. 462 (1892); Colorado Coal &c. Co. v. Lamb, 6 Colo. App. 255, 268 (1895); McLean &c. Co. v. McVey, 38 Ill. App. 158 (1890).

parent for the death of a child, damages may be recovered for nursing, medical expenses before death, and funeral expenses.⁸⁷ Mental suffering of parents for the death of a child is not a ground of recovery.⁸⁸ Loss of society for the death of a child, by a father, or comfort in rearing him to manhood, cannot be considered.⁸⁹ There is no rule governing damages allowable for the death of young children;⁹⁰ it rests in the sound discretion of the jury.⁹¹ The jury may give more than nominal damages;⁹² but they must not be wholly a matter of conjecture.⁹³ The law implies a pecuniary loss to a parent from the death of a minor child, for which compensation under the statute may be given for the loss of service.⁹⁴ A parent is not limited to his actual pecuniary injury in an action for damages for the loss of a child's services.⁹⁵ When the child was incapable of earning anything, the loss is a matter of conjecture

⁸⁷ *Pennsylvania: Cleveland & C. R. R. Co. v. Rowan*, 66 Pa. St. 393 (1870); *Pennsylvania R. R. Co. v. Bantom*, 54 id. 495 (1867); *Pennsylvania R. R. Co. v. Zebe*, 33 id. 318, 330 (1859).

Texas: Cost of medical and other like expenses. *City of Galveston v. Barbour*, 62 Tex. 172 (1884). See § 260.

⁸⁸ *Chicago & C. Bottling Co. v. Tietz*, 37 Ill. App. 599 (1890); *Munro v. Pacific Coast & C. Co.*, 84 Cal. 515 (1890); *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318, 330 (1859).

⁸⁹ *Mobile & C. R. R. Co. v. Watly*, 69 Miss. 145 (1891). Compensation is limited to the actual pecuniary loss sustained, on the theory of the parent's right to the services of the child during minority.

⁹⁰ *Chicago & C. R. R. Co. v. Wilson*, 35 Ill. App. 346 (1889).

⁹¹ See *Tiffany on Death by Wrongful Act*, § 180; 15 Cent. L. J. 286; *Brunswick v. White*, 70 Tex. 504 (1888). "And the value of the child's services during the period of her minority is to be ascertained

by you as best you can from your own judgment, common sense and sound discretion, and the evidence before you."

⁹² *Oldfield v. New York & C. R. R. Co.*, 14 N. Y. 310 (1856); *Prendergast v. New York & C. R. R. Co.*, 58 id. 652 (1874); *Birkett v. Knickerbocker Ice Co.*, 110 id. 504 (1888).

⁹³ *Houghkirk v. Prest. & C. Canal Co.*, 92 N. Y. 219 (1883). "While, as has been well said, a jury in these cases must, to a large extent, form their estimate of damages on conjectures and uncertainties, yet, where the evidence furnishes some standard for valuation of damages, a verdict wholly disregarding such standard ought not to stand." *Jackson v. Consolidated Traction Co.*, 30 Vr. 25, 28 (1896).

⁹⁴ *Stafford v. Rubens*, 115 Ill. 196 (1885); *City of Chicago v. Hesing*, 83 id. 204, 207 (1876); *City of Chicago v. Scholton*, 75 id. 468 (1874); *Bradley v. Sattler*, 156 id. 603 (1895).

⁹⁵ *Nehrbas v. Central Pacific R. Co.*, 62 Cal. 320 (1882).

and may be determined by the jury without the testimony of witnesses.⁹⁶ Chances of promotion of deceased may be considered.⁹⁷ No deduction should be made for the support of the child subsequent to the injury.⁹⁸ The condition of the family, with respect to a child killed, may be considered so far as it bears upon pecuniary loss.⁹⁹ In an action by a married woman for the death of her son damages may be apportioned between mother and father.¹

§ 268. Action by parent for causing death of adult child.—

When the action is brought by a parent, to recover damages for causing the death of an adult child, the compensation for the pecuniary loss "would be such sum as would purchase an annuity if such security was in the market, equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances of the particular case, reasonably accessible in evidence, and including the probable duration of life as shown by approved tables—such as the circumstances of the deceased, his occupation, age, health, habits of industry, sobriety and economy, his skill and capacity for business, the amount of his property, his annual earnings, and the probable duration of life."² Evidence of contribution by the child to the parent must be given where the child was of full age at the time of the death;³ such as giving assistance to parent, contributing money to the support of the parent, or that the parent had reasonable

⁹⁶ *Little Rock &c. Ry. Co. v. affairs. Ib.; Cooper v. Lake Shore &c. Ry. Co.*, 66 Mich. 261 (1887); *Barker*, 39 Ark. 491 (1882).

⁹⁷ *Davis v. St. Louis &c. Ry. Co.*, Illinois Central R. R. Co. v. Slater, 53 Ark. 117 (1890); *St. Louis &c. Ry. Co. v. Johnston*, 78 Tex. 536 (1890). *Vieths*, 93 Mo. 422 (1887).

⁹⁸ *Schmitz v. St. Louis &c. Ry. Co.*, 46 Mo. App. 380 (1891). *Henny*, 75 Tex. 220 (1889).

⁹⁹ *Louisville &c. Ry. Co. v. Rush*, R. Co. v. Cowser, 57 Tex. 293, 304 (1882). *Bonner, J.*, in *Houston &c. R.*

Take into account all the services the child might reasonably have performed in the family until it attained its majority, including actual labor in helping to carry on the household *Cherokee &c. Co. v. Limb*, 47 Kan. 469 (1891); *Fordyce v. McCants*, 51 Ark. 509 (1889). *Contra*, *Mollie Gibson Co. v. Sharp*, 5 Colo. App. 321 (1894).

expectation of pecuniary profit from the continued life of the child.⁴

§ 269. **Action by minor child for causing death of parent.**—When the action is brought on behalf of a minor child, to recover damages for causing the death of a parent, the measure of damages is the loss of support which the parent owed the child until its arrival at full age.⁵ Such compensation should begin from the death of the parent and not from the date of the injury;⁶ reasonable expectation of pecuniary benefit to children in their support or otherwise, is a proper element of damage.⁷ Loss of physical, intellectual and moral training and proper nurture by a child, are within the meaning of the term “pecuniary loss.”⁸ Especially so in the case of a father, if he was a man of industrious habits, of good character, a dutiful father, and tried to educate his children properly.⁹ So a mother’s care in case of a young child has been held to be included in the term “pecuniary.”¹⁰

§ 270. **Action by adult for causing death of parent.**—The fact that the children were all of age when their parent’s death was

⁴ *Fordyce v. McCants*, 51 Ark. &c. Ry. Co., 91 Mo. 511 (1887); *Redfield v. Oakland Cons. Street Ry. Co.*, 110 Cal. 277 (1895); *Searle v. Kanawaha &c. Ry. Co.*, 32 W. Va. 370 (1889); *Walker v. McNeill*, 17 Wash. St. 582 (1897); *St. Louis &c. Ry. Co. v. Maddry*, 57 Ark. 306 (1893); *Baltimore &c. R. R. Co. v. Stanley*, 54 Ill. App. 215 (1894).

⁵ *Atlanta &c. R. R. Co. v. Venable*, 67 Ga. 697 (1881); *McPherson v. St. Louis &c. Ry. Co.*, 97 Mo. 253 (1888); *Baltimore &c. R. R. Co. v. Trainor*, 33 Md. 542 (1870); *Baltimore &c. Turnpike Road v. State*, 71 Md. 573 (1889). Not confined to age of majority, her care and labor, her education, character and ability to train and guide them. *Redfield v. Oakland Cons. Street Ry. Co.*, 110 Cal. 277 (1895); *Tiffany on Death by Wrongful Act*, § 160.

⁶ *Atlanta &c. R. R. Co. v. Venable*, 67 Ga. 697 (1881).

⁷ Under Wis. Rev. Stats., § 4256; *Tuteur v. Chicago &c. Ry. Co.*, 77 Wis. 505 (1890).

⁸ *McIntyre v. New York Central R. R. Co.*, 37 N. Y. 287 (1867); *Tilley v. Hudson River R. R. Co.*, 24 id. 471 (1862); *Stoher v. St. Louis*

⁹ *St. Louis &c. R. R. Co. v. Maddry*, 57 Ark. 306 (1893); *St. Louis &c. Ry. Co. v. Sweet*, 60 id. 550 (1895). There being no testimony in the case tending to show that the deceased was fitted by nature or education, or by disposition, to furnish his children instruction, or moral, physical or intellectual training, an instruction based on such facts was held improper. *Chicago &c. R. R. Co. v. Austin*, 69 Ill. 426 (1873).

¹⁰ *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 252 (1864).

caused by negligence, would not preclude a recovery for the loss of such pecuniary benefit, as they had a reasonable expectation of securing from the parent's additional accumulations.¹¹

§ 271. **Action by beneficiaries for causing death of collateral relatives.**—When the action is brought by the beneficiaries, to recover damages for causing the death of collateral relatives, the measure of damages is compensation for their pecuniary loss, based upon a reasonable expectation of pecuniary advantage from the continuation of the life of the deceased.¹² The loss may consist of losses of prospective inheritances;¹³ or prospective gifts.¹⁴ It is not necessary to maintain the action, that the next of kin should have a legal claim upon the deceased for services or support, a reasonable expectation of pecuniary advantage from the continuation of the life of the deceased being enough.¹⁵

¹¹ *Tuteur v. Chicago &c. Ry. Co.*, 174 Ill. 495 (1898). The word 77 Wis. 505 (1890); *Demarest v. Little*, 18 Vr. 28 (1885). See *Lockwood v. New York &c. R. R. Co.*, 98 N. Y. 523 (1885). *Contra*, in Texas when not supported by the parent. *St. Louis &c. R. R. Co. v. Johnston*, 78 Tex. 536 (1890).

¹² *Boyden v. Fitchburg R. R. Co.*, 70 Vt. 125 (1897). “Life, by law, had a value for the loss of which the survivors had a

¹³ *Tiffany on Death by Wrongful Act*, §§ 159, 171. right to be compensated, in view of its circumstances.” *Pennsylvania R. R. Co. v. Keller*, 67 Pa. St. 308 (1871). The evidence need

¹⁴ *Tiffany on Death by Wrongful Act*, §§ 166–170. not afford data from which the extent of the pecuniary loss “can

¹⁵ *Boyden v. Fitchburg R. R. Co.*, 70 Vt. 125 (1897); *Kelly v. Twenty-third Street Ry. Co.*, 14 Daly, 418 (1888); *Paulmier v. Erie R. R. Co.*, 5 Vr. 156 (1870); *Illinois Central R. R. Co. v. Barron*, 5 Wall. 90 (1866); *Dalton v. South Eastern Ry. Co.*, 4 C. B. (N. S.) 296 (1858). Not by a nonresident *alien* mother, in *Pennsylvania. Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525 (1897). Lineal kindred of deceased are entitled to at least nominal damages without proof of loss of support. *Chicago &c. R. R. Co. v. Gunderson*, 174 Ill. 495 (1898). The word “pecuniary” is not to be construed in a strict sense. The recovery is not limited to the present loss in money, but prospective advantages of a pecuniary nature may be considered. *City of Vicksburg v. McLain*, 67 Miss. 4 (1889). “Life, by law, had a value for the loss of which the survivors had a right to be compensated, in view of its circumstances.” *Pennsylvania R. R. Co. v. Keller*, 67 Pa. St. 308 (1871). The evidence need not afford data from which the extent of the pecuniary loss “can be ascertained with reasonable certainty.” *Ohio &c. Ry. Co. v. Wangelin*, 152 Ill. 138 (1894). But remote and purely conjectural contingencies cannot be considered. *Tennessee Coal &c. R. R. Co. v. Herndon*, 100 Ala. 451 (1893). See *Duval v. Hunt*, 34 Fla. 85 (1894); *Tiffany on Death by Wrongful Act*, §§ 166–170; *Howard v. Delaware &c. Canal Co.*, 40 Fed. Rep. 195 (1889); *Tuteur v. Chicago &c. Ry. Co.*, 77 Wis. 505 (1890).

§ 272. **Verdicts for causing death — Excessive.**— In the following cases, verdicts for injuries causing death were held by the courts excessive: \$4,000 for death of an unmarried man, aged thirty-three;¹⁶ \$9,000 for death of son, aged over twenty-one years;¹⁷ \$10,000 for death of unmarried man, aged twenty-four years — reduced to \$5,000;¹⁸ \$25,000 for death of son, eighteen years old — reduced to \$2,000;¹⁹ \$7,500 — reduced to \$6,000 — for death of an unmarried man, twenty-two years old;²⁰ \$7,500 — reduced to \$1,000 — for death of man, sixty-two years old;²¹ \$12,000 for death of man fifty-seven years old, in declining health, whose monthly earnings were \$25;²² \$5,000 for death of a common laborer, in the absence of evidence showing what wages he received;²³ \$4,000 for death of one insolvent and in failing health, but able to superintend his business as innkeeper;²⁴ £5,000, in suit for wife and children;²⁵ \$4,000 for death of a married woman, aged twenty, no other evidence of pecuniary loss;²⁶ \$1,500 for death of a boy four years old;²⁷ \$4,500 — \$3,500 on second trial — remitted, \$1,235, for death of a boy;²⁸ \$2,000, without evidence of pecuniary loss;²⁹ \$3,400 for death of young man, eighteen years old, who earned \$1.40 per day;³⁰ \$4,000 for death of a boy eight years old;³¹ \$5,000 for death of a brakeman, eighteen years old;³² \$2,250 for death of a young man, eighteen years old, earning \$50 per month;³³ \$936 and \$1,056 for death of

¹⁶ *Carpenter v. Buffalo &c. R. R. Co.*, 38 Hun, 116 (1885).

¹⁷ *Houston &c. Ry. Co. v. Cowser*, 57 Tex. 293 (1882).

¹⁸ *Rose v. Des Moines &c. R. R. Co.*, 39 Iowa, 246 (1874).

¹⁹ *Myhan v. Louisiana Electric Light &c. Co.*, 41 La. Ann. 970 (1889).

²⁰ *McFee v. Vicksburg &c. R. R. Co.*, 42 La. Ann. 790 (1890).

²¹ *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327 (1891).

²² *Louisville &c. R. R. Co. v. Stacker*, 86 Tenn. 343 (1887) Rule for damages stated.

²³ *Illinois Central R. R. Co. v. Weldon*, 52 Ill. 290 (1869).

²⁴ *Hutton v. Windsor*, 34 Up. Can. Q. B. 487 (1874).

²⁵ *Morley v. Great Western Ry. Co.*, 16 Up. Can. Q. B. 504 (1858).

²⁶ *Mitchell v. New York &c. R. R. Co.*, 2 Hun, 535 (1874).

²⁷ *Lehman v. City of Brooklyn*, 29 Barb. 234 (1859).

²⁸ *Little Rock &c. Ry. Co. v. Barker*, 33 Ark. 350 (1878); 39 id. 491 (1882).

²⁹ *Lake Shore &c. Ry. Co. v. Sunderland*, 2 Ill. App. 307 (1878).

³⁰ *Chicago &c. Ry. Co. v. Bayfield*, 37 Mich. 205 (1877).

³¹ *City of Vicksburg v. McLain*, 67 Miss. 4 (1889).

³² *Parsons v. Missouri Pacific Ry. Co.*, 94 Mo. 286 (1887).

³³ *Hickman v. Missouri Pacific*

two boys aged thirteen and fifteen, respectively;³⁴ \$12,000 — reduced to \$10,000 — for death of husband, a railroad employe;³⁵ \$1,500 for death of son grown up, no evidence of having contributed to the parents;³⁶ \$40,000 — reduced to \$25,000 — for death of husband, leaving wife and minor children, who was kind and affectionate, twenty-five years old, in good health, sober, industrious, good business manager and earning \$150 per month;³⁷ \$10,000 for death of son, no evidence of pecuniary loss to next of kin;³⁸ \$9,000, no evidence of pecuniary loss;³⁹ \$3,500 — reduced to \$2,000 — for death of son;⁴⁰ \$3,000 for death of son;⁴¹ \$1,750 for death of a bridge carpenter, no evidence of pecuniary loss;⁴² £13,000 for death of father with family;⁴³ \$27,500 — reduced by court to \$15,000 — for death of father with family;⁴⁴ \$3,500 — reduced to \$1,500 — for death of a widow, aged forty-eight, who left three children, all of age;⁴⁵ \$1,800 for death of child five years old;⁴⁶ \$7,000 for death of wife, fifty-six years old;⁴⁷ \$20,000 for death of daughter, two years old;⁴⁸ \$3,000 for death of boy, fifteen years old, earning capacity about \$20 per month — reduced to \$1,500;⁴⁹ \$5,000 for death of a child between four and five years old.⁵⁰

§ 273. **Verdicts for causing death — Not excessive.**—In the following cases verdicts for injuries causing death were held by the courts not excessive: \$5,000 for death of a young unmarried man, twenty-five years old;⁵¹ \$4,000 for death of a single

³⁴ *Telfer v. Northern R. R. Co.*, 1 Vr. 188 (1862).

³⁵ *Central R. R. Co. v. Crosby*, 74 Ga. 737 (1885).

³⁶ *Cherokee &c. Co. v. Limb*, 47 Kan. 469 (1891).

³⁷ *Walker v. McNeill*, 17 Wash. St. 582 (1897).

³⁸ *Atchison &c. R. R. Co. v. Brown*, 26 Kan. 443 (1881).

³⁹ *Houston &c. Ry. Co. v. Cowser*, 57 Tex. 293 (1882).

⁴⁰ *Hutchins v. St. Paul &c. Ry. Co.*, 44 Minn. 5 (1890).

⁴¹ *Paulmier v. Erie R. R. Co.*, 5 Vr. 151 (1870).

⁴² *Serensen v. Northern Pac. R. R. Co.*, 45 Fed. Rep. 407 (1891).

⁴³ *Pym v. Great Northern Ry. Co.*, 2 B. & S. 759; 4 id. 396 (1863).

⁴⁴ *Demarest v. Little*, 18 Vr. 28 (1885).

⁴⁵ *McIntyre v. New York Central R. R. Co.*, 37 N. Y. 287 (1867).

⁴⁶ *Pennsylvania Co. v. Lilly*, 73 Ind. 252 (1881).

⁴⁷ *Nelson v. Lake Shore &c. Ry. Co.*, 104 Mich. 582 (1895).

⁴⁸ *Morgan v. Southern Pacific R. Co.*, 95 Cal. 510 (1892).

⁴⁹ *May v. West Jersey &c. R. R. Co.*, 33 Vr. 67 (1898).

⁵⁰ *Graham v. Consolidated Traction Co.*, 33 Vr. 90 (1898).

⁵¹ *Bierbaur v. New York Central &c. R. R. Co.*, 15 Hun, 559 (1878); affirmed, 77 N. Y. 588.

woman, thirty-six years old;⁵² \$2,000 for death of an unskilled laborer, married, fifty-five years old;⁵³ \$2,500 for death of a boy, seven years old;⁵⁴ \$10,000 for the death of a brakeman, where negligence was wilful;⁵⁵ \$8,000 for death of a husband;⁵⁶ \$2,000 for death of a boy, eighteen months old;⁵⁷ \$10,000 for death of a man whose expectancy of life was forty-two years, and his earnings \$650 annually;⁵⁸ \$3,000 for death of son, twenty-eight years old;⁵⁹ \$4,995 for death of a man, twenty-eight years old;⁶⁰ \$2,000 for death of son;⁶¹ \$3,550 for death of son, twenty-two and one-half years old;⁶² \$1,500 for death of daughter;⁶³ \$2,400 for death of son, twenty-one years old, healthy and industrious;⁶⁴ \$4,200 for death of son, twenty-six years old;⁶⁵ \$3,750 for death of son, thirty-five years old, who had been a judge;⁶⁶ \$1,000 for death of widow, sixty-one years old;⁶⁷ \$3,500 for death of girl, aged fourteen years;⁶⁸ \$5,000 for death of engineer;⁶⁹ \$1,000 for death of unmarried man, no evidence of pecuniary contribution to relatives and next of kin;⁷⁰ \$7,500 for death of married man, fifty-two years old;⁷¹ \$800 for death of a child less than four years old;⁷² \$2,500 for death of a workman, fifty-five years old, in fair health, with a large family, who could earn \$2.25 per day;⁷³ \$8,000

⁵² Bowles v. Rome &c. R. R. Co., 46 Hun, 324 (1887).

⁵³ Mulcairns v. City of Janesville, 67 Wis. 24 (1886).

⁵⁴ Johnson v. Chicago &c. Ry. Co., 64 Wis. 425 (1885).

⁵⁵ Louisville &c. R. R. Co. v. Brooks, 83 Ky. 129 (1885).

⁵⁶ Cook v. Clay Street Hill R. R. Co., 60 Cal. 604 (1882).

⁵⁷ Schrier v. Milwaukee &c. Ry. Co., 65 Wis. 457 (1886).

⁵⁸ McDermott v. Iowa Falls &c. Ry. Co., 85 Iowa, 180 (1892); 47 N. W. Rep. 1037.

⁵⁹ O'Callaghan v. Bode, 84 Cal. 489 (1890).

⁶⁰ Wells v. Denver &c. Ry. Co., 7 Utah, 482 (1891).

⁶¹ Chicago &c. R. R. Co. v. Shannon, 43 Ill. 338 (1867).

⁶² Missouri Pacific Ry. Co. v. Henny, 75 Tex. 220 (1889).

⁶³ City of Salem v. Harvey, 29 Ill. App. 483 (1888).

⁶⁴ Chicago &c. R. R. Co. v. Adler, 28 Ill. App. 102 (1887).

⁶⁵ Texas &c. Ry. Co. v. Lester, 75 Tex. 56 (1889).

⁶⁶ Illinois Cent. R. R. Co. v. Barron, 5 Wall. 90 (1866).

⁶⁷ Tuteur v. Chicago &c. R. R. Co., 77 Wis. 505 (1890).

⁶⁸ Pineo v. New York Cent. &c. R. R. Co., 34 Hun, 80 (1884).

⁶⁹ Erwin v. Neversink Steamboat Co., 23 Hun, 573 (1881).

⁷⁰ Kelly v. Twenty-third Street Ry. Co., 14 Daly, 418 (1888).

⁷¹ St. Louis &c. Ry. Co. v. Madry, 57 Ark. 306 (1893).

⁷² City of Chicago v. Scholton, 75 Ill. 468 (1874).

⁷³ Annas v. Milwaukee &c. R. R. Co., 67 Wis. 46 (1886).

for death of a man with thirty-one years of expectation of life;⁷⁴ \$15,000, deceased was careful, and defendant's engineer very reckless;⁷⁵ \$5,000 for death of a healthy man, forty-eight years old, who left a wife and three children;⁷⁶ \$5,000 for death of laboring man, thirty-six years old, who left a wife and six young children;⁷⁷ \$3,500 for death of a fireman thirty-nine years old;⁷⁸ \$5,000 for death of man thirty-one years old, who was sober and industrious, who had lived separate and apart from his wife for a year before the death;⁷⁹ \$2,000 for death of son six or seven years old;⁸⁰ \$3,000 for death of a boy eleven years and eight months old;⁸¹ \$1,550 for death of a strong, healthy girl eleven years old;⁸² \$2,500 for death of a healthy five-years-old boy;⁸³ \$2,500 for death of a boy nine years old;⁸⁴ \$1,000 for death of a boy sixteen months old;⁸⁵ \$1,200 for death of boy eight years old;⁸⁶ \$2,500 for death of boy seven years old;⁸⁷ \$2,000 for death of boy eighteen months old;⁸⁸ \$10,000 for death of laborer "stout, healthy and sober," thirty-five years old, who left a widow and two infant children;⁸⁹ \$5,000 in favor of widow and seven-years-old daughter, each, for death of father earning \$125 per month;⁹⁰ \$10,000 for death of an engineer, twenty-nine years old, earning \$125 per month;⁹¹ £3,000 for death of wife and children;⁹² \$1,500 for

⁷⁴ Tennessee &c. R. R. Co. v. Roddy, 85 Tenn. 400 (1886).

⁷⁵ Chesapeake &c. R. R. Co. v. Hendricks, 88 Tenn. 710 (1890).

⁷⁶ Bolinger v. St. Paul &c. R. R. Co., 36 Minn. 418 (1887).

⁷⁷ Board of Comrs. Howard Co. v. Legg, 110 Ind. 479 (1886).

⁷⁸ Smith v. Wabash &c. Ry. Co., 92 Mo. 359 (1887).

⁷⁹ Dallas &c. Ry. Co. v. Spicker, 61 Tex. 427 (1884).

⁸⁰ Chicago &c. R. R. Co. v. Becker, 84 Ill. 483 (1877).

⁸¹ Union Pacific Ry. Co. v. Dunden, 37 Kan. 1 (1887).

⁸² Cooper v. Lake Shore &c. Ry. Co., 66 Mich. 261 (1887).

⁸³ Ross v. Texas &c. Ry. Co., 44 Fed. Rep. 44 (1890).

⁸⁴ Ewen v. Chicago &c. Ry. Co., 38 Wis. 613 (1875).

⁸⁵ Hoppe v. Chicago &c. Ry. Co., 61 Wis. 357 (1884).

⁸⁶ Strong v. City of Stevens Point, 62 Wis. 255 (1885).

⁸⁷ Johnson v. Chicago &c. Ry. Co., 64 Wis. 425 (1885).

⁸⁸ Schrier v. Milwaukee &c. Ry. Co., 65 Wis. 457 (1886).

⁸⁹ Missouri Pacific Ry. Co. v. Lehmborg, 75 Tex. 61 (1889).

⁹⁰ St. Louis &c. Ry. Co. v. Johnston, 78 Tex. 536 (1890).

⁹¹ Texas &c. Ry. Co. v. Geiger, 79 Tex. 13 (1890).

⁹² Secord v. Great Western Ry. Co., 15 Up. Can. Q. B. 631 (1858).

death of a boy eleven years old;⁹³ \$5,000 for death of child six years old, bright, intelligent and healthy;⁹⁴ \$10,000 for death of man thirty-two years old, who contributed at least \$800 annually to the support of his wife and children;⁹⁵ \$6,908.98 for death of a man earning \$630 per annum, with twenty-six and seventy-two one-hundredth years of probable duration of life, who left him surviving no widow, but infant children;⁹⁶ \$7,500 for death of a married man, with wife and children, fifty-two years old, of industrious habits and ordinary business habits;⁹⁷ \$14,000 for death of a wife and mother;⁹⁸ \$5,000 for death of laboring man, who left a wife and two children, earned \$1.50 per day.⁹⁹

⁹³ *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445 (1868).

⁹⁴ *Houghkirk v. Delaware &c. Co.*, 92 N. Y. 219 (1883).

⁹⁵ *St. Louis &c. Ry. Co. v. Sweet*, 60 Ark. 550 (1895).

⁹⁶ *Louisville &c. R. R. Co. v. Graham*, 98 Ky. 688 (1896).

⁹⁷ *St. Louis &c. Ry. Co. v. Mad-dry*, 57 Ark. 306 (1893).

⁹⁸ *Redfield v. Oakland Cons. Street Ry. Co.*, 110 Cal. 277 (1895).

⁹⁹ *Baltimore &c. R. R. Co. v. Stanley*, 54 Ill. App. 215 (1894).

CHAPTER X.

QUESTIONS OF LAW AND FACT.

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| <p>§ 274. Negligence — When a question of law or fact.</p> <p>275. Province of the court and jury — The rule stated.</p> <p>276. Test of the right to go to the jury — Not what the court would find.</p> <p>277. Scintilla of evidence — Not sufficient.</p> <p>278. Applications of the rule — Illustrative cases.</p> <p>279. Contributory negligence — When a question of law or fact.</p> | <p>§ 280. Proximate cause — Question of fact for the jury.</p> <p>281. Master and servant — Questions of fact.</p> <p>282. Streets and public highways — Questions of fact.</p> <p>283. Damages — Personal injuries — Death.</p> <p>284. Other questions of fact germane to the issue of negligence.</p> |
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§ 274. Negligence — When a question of law or fact.— Whether negligence, in a particular case, is a question of law solely for the court, or a question of fact to be passed upon by a jury, under proper instructions, as to the law, by the court, is a question in the law of accident cases on which the courts are somewhat confused. The confusion and conflict are not so much about the principle as an abstract proposition of law, as in its application to particular cases in practice. The courts do not disagree upon the principle, but upon its application.¹ Thus, it has been ruled in many cases, that when the evidence is conflicting, negligence is a mixed question of law and fact.² When

¹ Wyatt v. Citizens Ry. Co., 55 Mo. 492 (1874). Mr. Justice Woodward says: "It is one thing to define a principle of law, and a very different matter to apply it well. The rights and duties of parties grow out of the circumstances in which they are placed." Pennsylvania R. R. Co. v. Kilgore, 32 Pa. St. 296 (1858).

(1872); Pittsburgh &c. R. R. Co. v. Spencer, 98 id. 186 (1884); Greenleaf v. Illinois &c. R. R. Co., 29 Iowa, 14 (1870); Pittsburgh &c. R. Co. v. Evans, 53 Pa. St. 250 (1866); McKee v. Bidwell, 74 id. 218 (1873); Norris v. Litchfield, 35 N. H. 271 (1857); Trow v. Vermont Central R. R. Co., 24 Vt. 487 (1852); Needham v. Louisville &c. R. R. Co., 85 Ky. 423 (1887).

² Gaag v. Vetter, 41 Ind. 254 R. R. Co., 85 Ky. 423 (1887).

undisputed, and the facts not contradicted, it is for the court.³ But when the facts are disputed and the inferences from those facts are uncertain, and different conclusions may be drawn by different minds, it is for the jury to make them.⁴ It becomes important, as was said in a Connecticut case, to distinguish between law and fact. The law determines the duty; the evidence shows whether the duty was performed. What duty rested upon the defendant is a question of law; was that duty properly performed is a question of fact.⁵ Negligence, therefore, is a question of law and fact. The court determines the legal duty; the jury determines, from the evidence, whether that duty, as a fact, has been omitted or performed.⁶ Negligence is not a fact to be decided by the court or by the opinion of witnesses, but an inference or conclusion to be drawn from all the surrounding facts.⁷

³ *Moebus v. Becker*, 17 Vr. 43 (1884); *Flemming v. Western Pacific R. R. Co.*, 49 Cal. 253 (1874); *Fletcher v. Atlantic &c. R. R. Co.*, 64 Mo. 484 (1877); *Anderson v. Cape Fear Steamboat Co.*, 64 No. Car. 399 (1870); *Nelson v. Chicago &c. Ry. Co.*, 60 Wis. 320 (1884); *East Tennessee &c. R. R. Co. v. Bayliss*, 74 Ala. 150 (1883); *City of Indianapolis v. Cook*, 99 Ind. 10 (1884); *Philadelphia &c. R. R. Co. v. Ritchie*, 102 Pa. St. 425 (1883); *Baker v. Westmoreland &c. Gas Co.*, 157 id. 593 (1893).

⁴ *McNamara v. North Pacific R. Co.*, 50 Cal. 581 (1875); *McCurtie v. Southern Pacific Co.*, 122 id. 558 (1898); *Woolfolk v. Macon &c. R. R. Co.*, 56 Ga. 457 (1876); *Pennsylvania Co. v. Conlan*, 101 Ill. 93 (1881); *Newark Passenger Ry. Co. v. Block*, 26 Vr. 608 (1893); *New York &c. R. R. Co. v. Marion*, 28 id. 94 (1894); *Comben v. Bellville Stone Co.*, 30 id. 226 (1896); *Commonwealth v. Vermont &c. R. R. Co.*, 108 Mass. 7 (1881); *Baltimore &c. R. R. Co. v. Fitzpatrick*, 35 Md. 44 (1871); *Philadelphia &c. R.*

Co. v. Killips, 88 Pa. St. 405 (1879); *Wilson v. Pennsylvania R. Co.*, 177 id. 503 (1896); *Alexander v. Maryland Steel Co.*, 189 id. 582 (1899); *Texas &c. Ry. Co. v. Levi*, 59 Tex. 674 (1883); *Hoye v. Chicago &c. Ry. Co.*, 62 Wis. 666 (1885); *Beach on Cont. Neg.* (3d ed.), § 444 *et seq.* Many other cases to the same effect may be found cited in the cases given.

⁵ *Nolan v. New York &c. R. R. Co.*, 53 Conn. 461, 471 (1885); 70 id. 159 (1898); *Detroit &c. R. R. Co. v. Van Steinburg*, 17 Mich. 99, 122 (1868).

⁶ *Detroit &c. R. R. Co. v. Van Steinburg*, 17 Mich. 99, 122 (1868). See *Fuller v. Citizens Nat. Bank*, 15 Fed. Rep. 875 (1882).

⁷ *Kaples v. Orth*, 61 Wis. 531 (1884); *Hoye v. Chicago &c. Ry. Co.*, 62 id. 666 (1885). "Negligence, in one sense, is a quality, attaching to acts dependent upon, and arising out of, the duties and relations of the parties concerned, and is as much a fact to be found by the jury, as the alleged acts to which it attaches, by virtue of

§ 275. Province of the court and jury — The rule stated.—

The most concise rule to be found in the books is that stated by Lord Cairns, viz.: "The judge has to say whether any facts have been established from which negligence *may* be reasonably inferred; the jurors have to say whether, from those facts, when submitted, negligence *ought to be* inferred."⁸ The rule is stated with more elaboration by Mr. Justice Williams, of the Supreme Court of Pennsylvania, thus: "The law is well settled that what is and what is not negligence, in a particular case, is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such cases, the standard of duty is not fixed, but variable. Under some circumstances, a higher degree of care is demanded than under others. And, when the standard shifts with the circumstances of the case, it is, in its very nature, incapable of being determined as matter of law, and must be submitted to the jury, to determine what it is and whether it has been complied with. But, when the standard is fixed, when the measure is defined by the law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court. And so, when there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence, as matter of law. But when the duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, when both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proved."⁹ It is the province of the jury to pass upon the facts and the inferences to be drawn from them. The court may, and should, pass upon the question whether there is any

such duties and relations." Roberts, C. J., in Texas &c. Ry. Co. v. Murphy, 45 Tex. 366 (1876).

⁸ Metropolitan Ry. Co. v. Jackson, L. R., 3 App. Cas. 197 (1877). Approved by Mr. Justice Gray, of the United States Supreme Court, in Randall v. Baltimore &c. R. R. Co., 109 U. S. 478 (1883); also in Newark Passenger Ry. Co. v. Block, 26 Vr. 607 (1893).

⁹ West Chester &c. R. R. Co. v. McElwee, 67 Pa. St. 311, 315 (1871).

To the same effect are McCully v. Clarke, 40 id. 399 (1861); Pennsylvania Canal Co. v. Bentley, 66 id. 30 (1870); Baker v. Westmoreland &c. Gas Co., 157 id. 593 (1893).

evidence from which negligence *may* be inferred, or the legal sufficiency of the evidence to support a verdict, if found by the jury.¹⁰ The line which divides the province of the jury from that of the court is: the one has to do with finding the existence or non-being of facts, and the inferences and conclusions to be drawn from them; the other has to pass upon the *legal sufficiency* of the facts to support a verdict, if found, or to declare that the facts proven in the case are such, that negligence *may* or *may not* be inferred by the jury.¹¹

§ 276. **Test of the right to go to the jury — Not what the court would find.**—The test to determine whether the facts proved will warrant the trial judge in submitting the case to the jury, and whether there is any evidence from which negligence may be inferred by the jury, is not that such facts, and the inferences to be drawn from them, would be sufficient to convince the court, if sitting on the jury, that the conclusion of negligence ought to be found, or a verdict in favor of the plaintiff should be rendered by the jury.¹² The courts have used various expressions to determine when a case should not be withdrawn from the jury, such as when the facts are in “substantial dispute”¹³ the trial judge must submit them to the jury, or a case should not be withdrawn from the jury

¹⁰ *Flori v. City of St. Louis*, 3 Mo. App. 231 (1877); *Gerke v. California Steam Nav. Co.*, 9 Cal. 251 (1858).

¹¹ The process of reasoning, says Dr. Wharton, by which the conclusion of negligence is reached, is *inductive*, not *deductive*; *a posteriori*, not *a priori*; it is *logical* and *social*, not *juridical*; a conclusion drawn from facts and circumstances, and not a certain deduction from fixed, absolute rules. Whart. on Neg., § 420. It pertains particularly to the province of the jury to make the process of logical reasoning and the inferences to be drawn from the facts on which the conclusion of negligence is founded.

¹² *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622 (1880); approved and followed, *Quaife v. Chicago &c. Ry. Co.*, 48 Wis. 520 (1879); *Morrell v. Peck*, 24 Hun. 38 (1881); *Jones v. New York &c. R. R. Co.*, 28 id. 364 (1882); *Payne v. Troy &c. R. R. Co.*, 83 N. Y. 574 (1881); *Newark Passenger Ry. Co. v. Block*, 26 Vr. 608 (1893).

¹³ *Newark Passenger Ry. Co. v. Block*, 26 Vr. 608 (1893). Or “if the facts be controverted, or not manifest.” *Aycrigg v. New York &c. R. R. Co.*, 1 Vr. 460 (1864). Or if there is no dispute about the facts if they are numerous in the details. *Central Branch Union Pacific R. R. Co. v. Hotham*, 22 Kan. 41 (1879).

unless the conclusion follows as matter of law, that no recovery can be had upon any view which can be properly taken of the facts, that the evidence tends to establish.¹⁴ Or if the facts and circumstances, although undisputed, are ambiguous, and of such a nature that reasonable men, unaffected by bias or prejudice, might have disagreed as to the inference or conclusion to be drawn from them, then the case should be submitted to the jury.¹⁵ Negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be naturally drawn from the evidence; but if only one conclusion can be reached from the evidence, it is a question of law for the court.¹⁶

§ 277. *Scintilla of evidence — Not sufficient.*— To authorize the submission of the question of negligence to the jury, it is not enough that there is a mere *scintilla* of evidence; although in some courts a *scintilla* of evidence was held sufficient. It is believed that a few of the State courts still adhere to that rule.¹⁷ But the tendency of the more recent cases is to repudiate the *scintilla* rule of evidence¹⁸ as being insufficient to submit the defendant's negligence to the jury.

¹⁴ Gardner v. Michigan Cent. R. Co., 150 U. S. 361 (1893). When there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact. Metropolitan R. R. Co. v. Hammett, 13 App. Cas. (D. C.) 370 (1898). For many other expressions of the rule see Shearm. & Redf. on Neg. (5th ed.), § 54, where many cases are cited.

¹⁵ Hoyer v. Chicago & C. Ry. Co., 62 Wis. 666, 672 (1885); Consolidated Traction Co. v. Scott, 29 Vr. 686 (1896). See McCann v. Consolidated Traction Co., 30 Vr. 481 (1896).

¹⁶ Herbert v. Southern Pacific Co., 121 Cal. 227 (1898). Or "when there is no room for two reasonable opinions about it." Klinker v.

Wheeling & C. Iron Co., 43 W. Va. 219 (1897).

¹⁷ Abbott's Trial Brief, p. 124; Cotton v. Wood, 8 C. B. (N. S.) 568 (1860). "It is now well settled in all the English and the chief American courts that a mere *scintilla* of evidence is not enough to go to the jury." Shearm. & Redf. on Neg. (5th ed.), § 56.

¹⁸ Abbott's Trial Brief, p. 124; Morris v. Lake Shore & C. Ry. Co., 148 N. Y. 182 (1896). And to adopt the general test as to the propriety of refusing to submit a point to the jury which is whether their verdict, on the point, if against the moving party, must be set aside as contrary to or against the weight of evidence. Abbott's Trial Brief, p. 117; Chicago & C. R. R. Co. v. Adler, 129 Ill. 339 (1889);

§ 278. Applications of the rule — Illustrative cases.— When the standard of duty is fixed and the measure of duty is defined by law, and it is the same under all circumstances, its omission is negligence and may be so declared by the court.¹⁹ Thus where a statute requires certain acts to be done or precautions against injury to be taken, a failure to comply with such requirements of the statute is negligence as a matter of law. When the fact is proven that the statute has been violated the court has to declare such omissions negligence,²⁰ without the intervention of a jury. Hence it has been held that running a railroad train within city limits at a rate of speed prohibited by statute, is negligence *per se*.²¹ An omission to ring a bell or blow a whistle, at a distance of at least eighty rods before reaching a crossing of a public highway, by a railroad company, as required by statute, is negligence.²² When a statute requires tumbling-rods of threshing-machines to be boxed, an omission to box, as required by statute, is negligence *per se*.²³ In some States it is held, that running trains by railroad companies in towns or cities in violation of valid municipal ordinances is negligence *per se*.²⁴ The weight of authority is to the effect that such violation of a valid public ordinance is simply "some evidence" of negligence which should be submitted to the jury.²⁵ So it has been held that putting a drunken man off a train, at a point where he was in danger of being injured by another train, is negligence.²⁶ To permit cars or other like bodies to stand so near a railroad com-

Offutt v. World's Columbian Exposition, 175 id. 472 (1898). There must be evidence upon which the jury might reasonably and properly conclude that there was negligence; there must be more than a mere surmise that there may have been negligence on the part of the defendant. Morris v. Lake Shore &c. Ry. Co., 148 N. Y. 182, 185 (1896).

¹⁹ West Chester &c. R. R. Co. v. McElwee, 67 Pa. St. 311, 315 (1871).

²⁰ Whart. on Neg., § 421, note 5; Houston &c. Ry. Co. v. Wilson, 60 Tex. 142 (1883); Toledo &c. Ry. Co. v. Foster, 43 Ill. 415 (1867).

²¹ Correll v. Burlington &c. R. R. Co., 38 Iowa, 120 (1874).

²² Owens v. Hannibal &c. R. R. Co., 58 Mo. 386 (1874); Houston &c. Ry. Co. v. Wilson, 60 Tex. 142 (1883).

²³ Reynolds v. Hindman, 32 Iowa, 146 (1871); Messinger v. Pate, 42 id. 443 (1876).

²⁴ Karle v. Kansas City &c. R. R. Co., 55 Mo. 476 (1874); Lake Erie &c. Ry. Co. v. Zoffinger, 107 Ill. 199 (1883).

²⁵ See §§ 23, 213.

²⁶ Central R. R. Co. v. Glass, 60 Ga. 441 (1879).

pany's tracks that its trains, in moving, must pass within a few inches of such bodies, has been held negligence.²⁷ So where a train of cars has been stopped at a station, and a passenger is in the act of getting off, and without allowing a reasonable time for that purpose, the train is suddenly started, whereby an injury occurs to a passenger, it is negligence in the company.²⁸ So, it is negligence to start a street car suddenly when a passenger is getting off.²⁹ Where defendant dug a ditch across a public sidewalk and allowed it to remain open at night, with no provisions for warning or protecting travellers, it was held that negligence was established as a matter of law, and a refusal to submit the question of negligence to the jury was not error;³⁰ so the failure of a traveller at the crossing of the track of a steam railroad to stop, look and listen before crossing the track is negligence *per se*.³¹

§ 279. Contributory negligence — When a question of law or fact.—The rules of law in determining the negligence of the defendant whether in any particular case it is a question of law for the court or a question of fact for the jury, are applicable to the question of plaintiff's contributory negligence.³² In determining that question the court must assume that all the evidence given in the case would have remained undisputed, and then the court must give to all the facts and circumstances, the construction most favorable to the plaintiff, that they will legitimately bear, including all reasonable inferences to be

²⁷ Chicago &c. R. R. Co. v. Pondrom, 51 Ill. 333 (1869); Winters v. Hannibal &c. R. R. Co., 39 Mo. 468 (1867); 52 id. 253.

²⁸ Jeffersonville &c. R. R. Co. v. Hendricks, 26 Ind. 228 (1866).

²⁹ Munroe v. Third Ave. R. R. Co., 18 Jones & S. 114 (1884); Wardle v. New Orleans City R. R. Co., 35 La. Ann. 202 (1883).

³⁰ Sexton v. Zett, 44 N. Y. 430 (1871).

³¹ Ehrisman v. East Harrisburg City Pass. Ry. Co., 150 Pa. St. 180 (1892); Pennsylvania R. R. Co. v. Beale, 73 id. 504 (1873). The rule

to stop, look and listen is applicable, in part, at least, to crossing street railways. *Ib.*; Wheelahan v. Philadelphia Traction Co., 150 Pa. St. 187 (1892). For many other cases illustrating the application of the rule by the courts, in submitting the question of negligence to the jury, to be found as a fact, as well as those cases which have been withdrawn by the court from consideration of the jury, see Chapter XI.

³² Hoyer v. Chicago &c. Ry. Co., 62 Wis. 666, 672 (1885).

drawn from them.³³ There are many classes of cases in which the courts have defined and fixed the standard of duty both in its application to the defendant and to the plaintiff. In such cases, where the facts are undisputed or the inferences to be drawn from them are certain, the court should decide the question of plaintiff's contributory negligence as a matter of law.³⁴ As a general principle, it is only where the circumstances of the case are such that the standard and measure of duty are fixed and defined by law, and are the same under all circumstances; or where the facts are undisputed, and but one reasonable inference can be drawn from them, that the court can interpose and declare, *as matter of law*, that there is such contributory negligence, as will defeat the action of the plaintiff. As a general proposition, a question of negligence is a question of fact, and must be submitted to the jury.³⁵ Whether one was guilty of contributory negligence in getting on or off of moving trains and cars, except in exceptional cases, must generally be a question

³³ Hoyer v. Chicago &c. Ry. Co., 101 Mo. 93 (1890); Detroit &c. R. R. Co. v. Van Steinburg, 17 Mich. 99, 120 (1868).

³⁴ Avery, Ch. J., in Washington &c. R. R. Co. v. Grant, 11 App. Cas. (D. C.) 107, 114 (1897). If the question is a debatable one, it must be submitted to the jury. Mahnken v. Freeholders of Monmouth, 33 Vr. 404 (1898). "There are four heads to this subject: (a) When the facts are uncontroverted or incontrovertible, and the question of negligence is for the court. (b) When the facts are uncontroverted or incontrovertible, and the question of negligence is for the jury. (c) When the facts are to be found by the jury, and the question whether such facts, if so found, impute negligence, is to be determined by the court. (d) When the facts are to be found by the jury, and the question whether such facts, if so found, impute negligence, is to be determined by the jury." Thomas on Neg., p. 365.

³⁵ Heaney v. Long Island R. R. Co., 112 N. Y. 122 (1889); West Jersey R. R. Co. v. Ewan, 26 Vr. 574 (1893); Piper v. New York &c. R. R. Co., 156 N. Y. 224 (1898); Pool v. Southern Pacific Co., Utah, 58 Pac. Rep. 326 (1899). Only where no other inference can fairly and reasonably be drawn from the facts in evidence. Wil-

for the jury.³⁶ So whether it is contributory negligence to alight from a slowly-moving horse car.³⁷ So whether riding upon the platform of an electric street car is contributory negligence is a question for the jury.³⁸ So the plaintiff's negligence, is a question of fact for the jury, when a passenger alights from a cable car at a street crossing and attempts to cross in front of another car coming in an opposite direction, without stopping to look and listen.³⁹

§ 280. Proximate cause — Question of fact for the jury.—

One of the essential elements in the proof of negligence, is to show that the negligence complained of was the proximate cause of the injury to the plaintiff. When the proximate cause of the plaintiff's injury is at issue, it has been held in many cases, that it is a question of fact to be submitted to the jury under all the circumstances and facts proven in the case.⁴⁰ But whether the cause, when found by the jury, is too remote to allow compensation by way of damages, is a question of law to be decided by the court.⁴¹ The rule of law requires that the

³⁶ Eppendorf v. Brooklyn &c. R. Co., 69 N. Y. 195 (1877); Shearm. & Redf. on Neg. (5th ed.), § 520. It is, presumptively, a negligent act for a passenger to attempt to alight from a moving train. Burrows v. Erie Ry. Co., 63 N. Y. 556 (1876).

³⁷ New Jersey Traction Co. v. Gardner, 31 Vr. 571 (1897).

³⁸ Watson v. Portland &c. Ry. Co., 91 Me. 584 (1898); City Ry. Co. v. Lee, 21 Vr. 435 (1888).

³⁹ Smith v. Union Trunk Line, 18 Wash. St. 351 (1897); Consolidated Traction Co. v. Scott, 29 Vr. 682 (1896). See Chapter XIII, Contributory Negligence.

⁴⁰ Shearm. & Redf. on Neg. (5th ed.), § 55. See § 21; Milwaukee &c. R. R. Co. v. Kellogg, 94 U. S. 469 (1876); Ehr Gott v. Mayor &c. New York, 96 N. Y. 264 (1884); Lehigh Valley R. R. Co. v. McKeen, 90 Pa. St. 122 (1879); Fairbanks v. Kerr,

70 id. 86 (1871); Willey v. Inhabitants of Belfast, 61 Me. 569 (1872); American Express Co. v. Risley, 179 Ill. 295 (1899); Gilman v. Noyes, 57 N. H. 627 (1876); Boothby v. Grand Trunk Ry. Co., 66 id. 342 (1890); Kellogg v. Chicago &c. Ry. Co., 26 Wis. 223 (1870); Jeffs v. Rio Grande Western Co., 9 Utah, 374 (1894); Hall v. Ogden City Ry. Co., 13 id. 243 (1896); Waterman v. Chicago &c. R. R. Co., 82 Wis. 613 (1892); Sloane v. Southern Cal. R. Co., 111 Cal. 668 (1895); Newark &c. R. R. Co. v. McCann, 29 Vr. 642 (1896); Union Pacific Ry. Co. v. Evans, 52 Neb. 50 (1897); Galveston &c. Ry. Co. v. Sweeney, 14 Tex. Civ. App. 216 (1896).

⁴¹ Mangan v. Atterton, L. R., 1 Exch. 239 (1866); Clark v. Chambers, L. R., 3 Q. B. D. 327 (1878); Fowlkes v. Southern Ry. Co., 96 Va. 742 (1899); Clemens v. Hannibal &c. R. R. Co., 53 Mo. 366 (1873);

damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things. The term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss.⁴² Thus, many cases hold, that whether the damage is the natural consequence and effect of defendant's negligence is a question of fact for the jury.⁴³

§ 281. **Master and servant — Questions of fact.**— Whether a servant was acting within the scope of his employment or was engaged in the line of his duty at the time the injury occurred, it has been held, was properly left to the jury.⁴⁴ So whether one is an independent contractor;⁴⁵ or whether workmen are fellow-servants.⁴⁶ Whether due care and caution have been exercised

Newark &c. R. R. Co. v. McCann, 29 Vr. 642 (1896). Whether the defective condition in a public highway was the proximate cause of the injury is for the jury. Stark v. Lancaster, 57 N. H. 88 (1876); Littleton v. Richardson, 32 id. 59 (1855); Verrill v. Inhabitants of Minot, 31 Me. 299 (1850); Willey v. Inhabitants of Belfast, 61 id. 569 (1872). So, whether the blowing of a locomotive whistle was the cause of the accident. Philadelphia &c. R. R. Co. v. Killips, 88 Pa. St. 405 (1879); Pennsylvania R. R. Co. v. Barnet, 59 id. 259 (1868).

⁴² Dixon, J., in Willey v. West Jersey R. R. Co., 15 Vr. 251 (1882); Newark &c. R. R. Co. v. McCann, 29 id. 644 (1896).

⁴³ Whart. on Neg., § 155; Bajies v. Syracuse &c. R. R. Co., 34 Hun, 153 (1884); Jeffersonville &c. R. R. Co. v. Riley, 39 Ind. 568 (1872); Perry v. Southern Pacific R. R. Co., 50 Cal. 578 (1875); Saxton v. Bacon, 31 Vt. 540 (1859); Atkinson v. Goodrich Transp. Co., 60 Wis. 141 (1884); Fairbanks v. Kerr, 70 Pa.

St. 86 (1871); Patten v. Chicago &c. Ry. Co., 32 Wis. 524 (1873). In Shearm. & Redf. on Neg. (5th ed.), § 28, it is said the courts have indicated a disposition to leave all doubtful cases to the jury.

⁴⁴ Whart. on Neg., § 167; Whatman v. Pearson, L. R., 3 C. P. 422 (1868); Burns v. Poulson, 8 id. 563 (1873); McKenzie v. McLeod, 10 Bing. 385 (1834); Courtney v. Baker, 60 N. Y. 1 (1875); Johnson v. Armour, 18 Fed. Rep. 490 (1883); Perigo v. Chicago &c. R. R. Co., 55 Iowa, 326 (1880); Walbert v. Trexler, 156 Pa. St. 112 (1893); Parkinson Sugar Co. v. Riley, 50 Kan. 401 (1893). Otherwise in Storey v. Ashton, L. R., 4 Q. B. 476 (1869); Stevens v. Armstrong, 6 N. Y. 435 (1852); Ayerigg v. New York &c. R. R. Co., 1 Vr. 460 (1864).

⁴⁵ Carlson v. Stocking, 91 Wis. 432 (1895).

⁴⁶ Mullen v. Philadelphia &c. Steamship Co., 78 Pa. St. 25 (1875); Toledo &c. Ry. Co. v. Moore, 77 Ill. 217 (1875); Chicago &c. Ry. Co.

by the master depends upon facts of a complicated character. It is a question for the jury under instructions from the court.⁴⁷ Upon the question whether a master properly explained to his servant the risks incident to his employment, the facts being in doubt, should be submitted to the jury.⁴⁸ The question whether, from previous experience, the servant should have comprehended the danger, so that neither warning nor instruction was necessary, is for the jury.⁴⁹ In a case in the Supreme Court of Indiana, Mr. Justice Mitchell, speaking for the court, said: "When an inexperienced servant is required to perform a hazardous service, in the performance of which extraordinary caution or peculiar skill is required in order to enable him to avoid dangers which may be apparent, it may be a question for a jury to determine whether, under all the circumstances, the master gave sufficient caution of the danger or adequate information of the means necessary to avoid it, or whether the servant was guilty of contributory negligence in not avoiding it."⁵⁰ Whether the master exercised the requisite caution in

v. Moranda, 108 id. 576 (1884); of ordinary care on his part to Springside Coal Mining Co. v. observe dangers within his knowledge, are questions for the jury. Grogan, 169 id. 50 (1897). The definition of what constitutes a Comben v. Bellville Stone Co., 30 fellow servant may be a question Vt. 226 (1896).

of law, but it is always a question 48 Ryan v. Tarbox, 135 Mass. 207 of fact, to be determined from the (1883); Wheeler v. Wason Mfg. Co., evidence, whether the particular id. 294 (1883).

case falls within the definition. 49 Chopin v. Badger Paper Co., Wabash &c. Ry. Co. v. Mahaffee, 83 Wis. 192 (1892).

16 Ill. App. 290 (1885). *Contra*, 50 Atlas Engine Works v. Randall, 100 Ind. 293, 300 (1884); Johnson v. Boston Tow Boat Co., McDougall v. Ashland Fibre Co., 97 135 Mass. 209 (1883).

47 Whart. on Neg., § 243; Fletcher Wis. 382 (1897). See also McGowan v. La Plata Mining Co., 9 v. Boston &c. R. R. Co., 1 Allen, 9 Fed. Rep. 861 (1882); Coombs v. (1861). So where there is a fair New Bedford Cordage Co., 102 dispute in the evidence, or two Mass. 596 (1869); Sullivan v. India classes of conclusions can reasonably Mfg. Co., 113 id. 396 (1873); Shanny be reached from it, whether the injury v. Androscoggin Mills, 66 Me. 420, to the servant was the result of the negligence of the master 427 (1876); Daester v. Mechanics to exercise the care required &c. Mill Co., 11 Mo. App. 593 (1881); to provide proper machinery and Rummel v. Dilworth, 131 Pa. St. appliances for the use of the servant, 509 (1890); McIntyre v. Empire or a proper place in which Printing Co., 103 Ga. 288 (1897). The age and intelligence of a la-

guarding dangerous machinery is a question for the jury, under the circumstances.⁵¹ Whether any precautions were required to avoid danger in using an elevator, and whether the instructions given to the foreman were a sufficient precaution, are questions of fact for the jury;⁵² so whether the master used due care in selecting and employing competent servants, and whether he knew a servant to be incompetent and unfitted to perform the service he was hired to execute;⁵³ so, too, it is a question for the jury whether a servant was aware of the defects in machinery, or should have been aware of them, and knowingly incurred the risks of damages;⁵⁴ likewise, whether the master knew or ought to have known that the staging which fell and injured the servant was insecure.⁵⁵

§ 282. Streets and public highways — Questions of fact.— In those States in which municipalities are liable for injuries on public highways caused by negligence in not keeping them safe

borer injured by machinery, and his experience in the use of such machinery, may be considered by the jury in an action by him for the injury. *Huizega v. Cutler & Co.*, 51 Mich. 272 (1883).

⁵¹ *Conroy v. Vulcan Iron Works*, 62 Mo. 35 (1876); *Ackart v. Lansing*, 48 How. Pr. 374 (1874); *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294 (1883). Questions of skill, negligence, care and proper management, in any business, are questions of fact to be submitted to a jury. *Frankford & Co. v. Philadelphia & C. R. R. Co.*, 54 Pa. St. 345 (1867).

⁵² *Avilla v. Nash*, 117 Mass. 318 (1875). In an action for injuries received from a mining blast, the question of the necessity of precautions against injury, whether any notice was given before the blast was fired, and, if so, whether it was sufficient, are for the jury. *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163 (1883).

⁵³ *Michigan Central R. R. Co. v.*

Gilbert, 46 Mich. 176 (1881); *Mann v. Delaware & C. Canal Co.*, 91 N. Y. 495 (1883).

⁵⁴ *Whart. on Neg.*, §§ 217, 243; *Dale v. St. Louis & C. Ry. Co.*, 63 Mo. 455 (1876); *Johnson v. Bruner*, 61 Pa. St. 58 (1869); *Huddleston v. Lowell Machine Shops*, 106 Mass. 282 (1871); *Clarke v. Holmes*, 7 Hurlst. & N. 937 (1862). *Beck, J.*: "The knowledge of the defects possessed by intestate, and his ability, in the exercise of ordinary diligence, to acquire knowledge thereof, are questions of fact to be determined upon the testimony submitted in the case, they are not questions of law." See *Mayes v. Chicago & C. Ry. Co.*, 63 Iowa, 567 (1884); *International & C. R. R. Co. v. Kindred*, 57 Tex. 491 (1882). So, too, that an embankment was dangerous and liable to cave and fall in. *Thompson v. Chicago & C. Ry. Co.*, 14 Fed. Rep. 564 (1883).

⁵⁵ *Arkerson v. Dennison*, 117 Mass. 413 (1875).

and in repair, it has been held, that whether such a public highway is dangerous and out of repair, or safe and convenient for travellers, is a question of fact to be submitted to the jury.⁵⁶ So, too, whether a substantial railing is necessary,⁵⁷ and sufficient;⁵⁸ likewise whether an excavation is deep and dangerous, and in dangerous proximity to the public highway.⁵⁹ Whether

⁵⁶ Maine: *Merrill v. Inhabitants of Hampden*, 26 Me. 234 (1846); *Tripp v. Inhabitants of Lyman*, 37 id. 250 (1854); *Lawrence v. Inhabitants of Mt. Vernon*, 35 id. 100 (1852).

Massachusetts: *Fitz v. City of Boston*, 4 Cush. 365 (1849); *Billings v. City of Worcester*, 102 Mass. 329 (1869).

New Hampshire: Whether a stick of wood in a highway is an obstruction is for the jury. *Johnson v. Town of Haverhill*, 35 N. H. 74 (1857); *Winship v. Enfield*, 42 id. 197 (1860); *Dumas v. Hampton*, 58 id. 134 (1877).

New York: See *Bullock v. Mayor &c. New York*, 99 N. Y. 654 (1885).

Vermont: *Green v. Town of Danby*, 12 Vt. 338 (1840); *Kelsey v. Town of Glover*, 15 id. 708 (1843); *Rice v. Town of Montpelier*, 19 id. 470 (1847); *Sessions v. Town of Newport*, 23 id. 9 (1847); *Cassedy v. Town of Stockbridge*, 21 id. 391 (1849).

Wisconsin: *McWaugh v. City of Milwaukee*, 32 Wis. 200 (1873); *Cremer v. Town of Portland*, 36 id. 92 (1874); *Hammond v. Town of Mukwa*, 40 id. 35 (1876); *McNamara v. Village of Clinton*, 62 id. 207 (1885). See *Born v. Allegheny &c. Plank Road Co.*, 101 Pa. St. 334 (1882); *City of Providence v. Clapp*, 17 How. 161 (1854); *Whart. on Neg.*, § 989; 1 *Thomp. on Neg.* 355, § 19. The question what is a "safe and convenient" road or bridge, or what is a "de-

fect or want of repair" therein, or "an insufficiency," within the meaning of these terms as used in the statutes, is, generally, one of fact for the jury upon the circumstances of each particular case, such as the season of the year, the hour of the day or night the accident occurred, the location of the way and the use to which it is to be put, as well as the nature of the accident itself. *Shearm. & Redf. on Neg.* (5th ed.), § 350.

⁵⁷ *Leicester v. Town of Pittsford*, 6 Vt. 245 (1834). Or whether a guard-rail or barrier was necessary. *Drew v. Town of Sutton*, 55 Vt. 586 (1882); *Wellman v. Susquehanna Depot*, 167 Pa. St. 239 (1895); *Day v. City of Mt. Pleasant*, 70 Iowa, 193 (1886).

⁵⁸ *Lyman v. Inhabitants of Amherst*, 107 Mass. 339 (1871); *Davenport v. Ruckman*, 10 Bosw. 20, 38 (1862).

⁵⁹ *Sanders v. Reister*, 1 Dak. 151 (1875). So, what precautions against accident are required in repairing a defective sidewalk. *City of Independence v. Jekel*, 38 Iowa, 427 (1874). The law has nowhere undertaken to define at what distance in feet and inches a dangerous place must be from the highway, in order to cease to be in close proximity to it. It must necessarily be a practical question to be decided by the good sense and experience of the jury. *Warner v. Inhabitants of Holyoke*, 112 Mass. 367 (1873).

a turnout in a highway is sufficient is a question of fact.⁶⁰ Whether a cellar along the line of a public street, unprotected by a suitable barrier, constitutes a defect, is a question for the jury.⁶¹ Whether one was "travelling upon the highway," within the meaning of the statute, at the time of the injury to his horse, is a mixed question of law and fact.⁶² Whether rolling hogsheads down skids from a truck to the sidewalk, without using danger signals or stationing any one to warn pedestrians, was negligent is a question for the jury.⁶³ So reasonable necessity to justify an obstruction in a street for carrying on adjoining owner's business is for the jury.⁶⁴ Whether a highway should be guarded at a particular place is generally a question of fact for the jury.⁶⁵ Also, whether it is negligence to leave a horse unhitched in a public highway.⁶⁶ Where plaintiff was attempting to pass defendant, who was driving in the same direction, it is for the jury to say whether defendant, in the exercise of reasonable care, should have looked behind or sidewise to avoid a collision.⁶⁷ The degree of prudence and care required of a stranger passing along a street in a populous city, after nightfall, must be left to the jury.⁶⁸ So, too, what constitutes ordinary care under like circumstances;⁶⁹ also, whether the

⁶⁰ *Stark v. Lancaster*, 57 N. H. N. Y. 648 (1888); *Denby v. Willer*, 88 (1876). 59 Wis. 240 (1884); *Jochem v. Robinson*, 72 id. 199 (1888); *Callanan v. Gilman*, 107 N. Y. 360 (1887).

⁶¹ *Stark v. City of Portsmouth*, 52 N. H. 221 (1872). So also whether a sidewalk was reasonably safe on account of ice having accumulated. *Hall v. City of Lowell*, 10 Cush. 260 (1852); *Congdon v. City of Norwich*, 37 Conn. 414 (1870). ⁶⁵ *Burrell Township v. Unca-pher*, 117 Pa. St. 353 (1887).

⁶² *Cummings v. Centre Harbor*, 57 N. H. 17 (1876). Compare *Sleeper v. Worcester & C. R. R. Co.*, 58 id. 520 (1879); *Hunt v. City of Salem*, 121 Mass. 294 (1876); *Hardy v. Keene*, 52 N. H. 370 (1872); *Varney v. Manchester*, 58 id. 430 (1878). ⁶⁶ *Vinton v. Schwab*, 32 Vt. 612 (1860); *Griggs v. Frankenstein*, 14 Minn. 81 (1869).

⁶³ *Blaustein v. Guindon*, 83 Hun, 5 (1894); 31 N. Y. Supp. 559. ⁶⁷ *Rand v. Syms*, 162 Mass. 163 (1894). ⁶⁸ *Matheny v. Wolffs*, 2 Duv. 137 (1865).

⁶⁴ *Shook v. City of Cohoes*, 108 (1876). ⁶⁹ *Stuart v. Inhabitants of Machias Post*, 48 Me. 477 (1861); *Devlin v. Bain*, 11 Up. Can. C. P. 523 (1862); *Griffin v. Town of Auburn*, 58 N. H. 121 (1877); *Sleeper v. Worcester & C. R. R. Co.*, id. 520 (1879); *Tuttle v. Farmington*, id. 13 (1876).

town authorities had notice of a defect in a highway.⁷⁰ It is a question of fact whether, at the time of the accident, the excavation in a highway was without a sufficient guard or light;⁷¹ also, whether the danger was obvious and visible.⁷² So, too, whether it was negligence in the plaintiff to walk upon a sidewalk at night, without a light.⁷³ It has been held, a question for the jury to determine what notice is reasonable to give of the approach of a train of cars at railroad crossings.⁷⁴

§ 283. **Damages — Personal injuries — Death.**— The amount of damages to be awarded, as compensation for personal injuries, is to a large extent a question of fact, to be determined by the jury.⁷⁵ What amount shall be awarded rests in the discretion of the jury;⁷⁶ in the judgment, experience and common sense of the ordinary juror.⁷⁷ The jury must be limited to compensatory damages.⁷⁸ The amount of such damages cannot be left to the mere caprice of the jury. So damages for causing death under the statute must, within the limits of the

⁷⁰ Colley v. Inhabitants of Westbrook, 57 Me. 181 (1869); Bradbury v. Inhabitants of Falmouth, 18 id. 64 (1841). Upon the circumstances of each case it is for the jury to determine whether the continuance of a defect in a highway amounted to a notice of its existence. *Ib.*; Sheel v. City of Appleton, 49 Wis. 125 (1880); City of Newport v. Miller, 93 Ky. 22 (1892); Enright v. City of Atlanta, 78 Ga. 288 (1886).

⁷¹ Clark v. Fry, 8 Ohio St. 358, 375 (1858); Bateman v. Ruth, 3 Daly, 378 (1871); City of Sterling v. Thomas, 60 Ill. 264 (1871).

⁷² Clayards v. Dethick, 12 Q. B. 439 (1848).

⁷³ Maloy v. New York &c. R. R. Co., 58 Barb. 182 (1870).

⁷⁴ Linfield v. Old Colony R. R. Co., 10 Cush. 562 (1852). Not at a highway crossing in respect to which the statutory duty exists.

Cordell v. New York &c. R. R. Co., 64 N. Y. 535 (1876); Shaber v. St. Paul &c. Ry. Co., 28 Minn. 103 (1881). A question of law for the court. Loucks v. Chicago &c. Ry. Co., 31 Minn. 526 (1884). When special circumstances exist which might reasonably call for such precautions as having gates, flagmen and watchmen stationed at railroad crossings, it is a question for the jury, whether not having them is negligence. *Shearm. & Redf. on Neg.* (5th ed.), § 466.

⁷⁵ See §§ 231, 263.

⁷⁶ Chicago &c. R. R. Co. v. Warner, 108 Ill. 538 (1884); Springfield Consolidated Ry. Co. v. Hoeffner, 175 id. 634 (1898).

⁷⁷ Brunswick v. White, 70 Tex. 504 (1888); Walker v. Erie Ry. Co., 63 Barb. 260 (1872).

⁷⁸ Hell v. Glanding, 42 Pa. St. 493 (1862); Collins v. Leafey, 124 id. 203 (1889).

statute, be left, to be determined as a fact, to the discretion and judgment of the jury.⁷⁹ But when the evidence furnishes some standard for valuation of damages, a verdict wholly disregarding such standard ought not to stand.⁸⁰

§ 284. **Other questions of fact germane to the issue of negligence.**—Negligence of the defendant and the contributory negligence of the plaintiff depend, frequently, upon some collateral or surrounding fact or circumstance which must be established before the principal question at issue can be ascertained. Such questions are usually questions of fact for the jury to find from the evidence. Thus, what is a “brilliant and conspicuous light on the forward end of each locomotive” is a question of fact for the jury;⁸¹ so the proper construction of a railroad platform and its condition with reference to the track, in a suit by an employee.⁸² Whether a railroad company was running its trains of cars at too great a speed through or into a populous town.⁸³ The sudden sounding of a steam whistle by an engineer, whether justifiable, prudent or proper;⁸⁴ whether the rate of speed of a train is dangerous when the question is affected by various considerations, and no law or ordinance regulating the speed of trains is in evidence.⁸⁵ The sufficiency of a necessary warning to a passenger not to extend his head out of the car window, which was printed and posted in the car, and whether the plaintiff did actually hear the warning that was given in addition thereto, are questions for the jury;⁸⁶ so, whether a defect in a railroad track or in the coaches could have been discovered and avoided, from which an injury occurred to a passenger;⁸⁷ so, too, whether plaintiff was a passen-

⁷⁹ See § 263; *Chicago &c. R. R. Co. v. Shannon*, 43 Ill. 338 (1867).

⁸⁰ *Jackson v. Consolidated Traction Co.*, 30 Vr. 28 (1896).

⁸¹ *Pennsylvania Co. v. Conlan*, 101 Ill. 93 (1881).

⁸² *Chicago &c. R. R. Co. v. Clark*, 11 Ill. App. 104 (1882).

⁸³ *Toledo &c. Ry. Co. v. Foster*, 43 Ill. 415 (1867); *Philadelphia &c. R. R. Co. v. Long*, 75 Pa. St. 257 (1874).

⁸⁴ *Hill v. Portland &c. R. R. Co.*, 55 Me. 438 (1867); *Philadelphia &c. R. R. Co. v. Killips*, 88 Pa. St. 405 (1879).

⁸⁵ *Frick v. St. Louis &c. Ry. Co.*, 75 Mo. 595 (1882).

⁸⁶ *Laing v. Colder*, 8 Pa. St. 479 (1848).

⁸⁷ *Edgerton v. New York &c. R. Co.*, 35 Barb. 193 (1860).

ger.⁸⁸ Whether reasonable diligence was used to discover the source of the leak in a gas pipe and to remedy it, within a reasonable time, is for the jury.⁸⁹

⁸⁸ Ramm v. Minneapolis &c. Ry. Co., 94 Iowa, 300 (1895). Other questions of fact. The want of skill in the construction of a railway embankment. Great Western Ry. Co. v. Braid, 1 Moo. P. C. (N. S.) 101 (1863). Failure of an engineer to ring the bell while backing cars towards the plaintiff. Ditterner v. Chicago &c. Ry. Co., 47 Wis. 138 (1879). Or to blow a locomotive whistle. Terre Haute &c. R. R. Co. v. Jones, 11 Ill. App. 322 (1882); Toledo &c. Ry. Co. v. Foster, 43 Ill. 415 (1867). ⁸⁹ Consolidated Gas Co. v. Crocker, 82 Md. 113 (1895). The questions whether dangers exist at the station or depot of a railroad company, and whether they were habitual and notorious, and whether the company had knowledge of them, or should have had such knowledge, where the evidence is in dispute, are questions which must be submitted to the jury for their determination. Exton v. Central R. R. Co., 33 Vr. 7 (1898).

CHAPTER XI.

QUESTIONS OF LAW AND FACT — CONTINUED.

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| § 285. Questions of law — Illustrative cases. | § 290. The same subject continued — Illustrations. |
| 286. The same subject continued — Illustrations. | 291. The same subject continued — Illustrations. |
| 287. The same subject continued — Illustrations. | 292. The same subject continued — Illustrations. |
| 288. The same subject continued — Illustrations. | 293. The same subject continued — Illustrations. |
| 289. Questions of fact — Illustrative cases. | 294. The same subject continued — Illustrations. |

§ 285. Questions of law — Illustrative cases.— If at the end of the plaintiff's case he leaves the case in even scales, and does not satisfy the court, that the injury was occasioned by the negligence or default of the defendant, the plaintiff cannot succeed.¹ It is not a sufficient objection to the action of the court in ordering a nonsuit, that there was some evidence from which negligence on the part of the defendant might have been inferred, unless there was evidence on which a jury might reasonably and properly conclude that there was negligence.²

¹ Morgan v. Sim, 11 Moore P. C. 312 (1857).

² Beaulieu v. Portland Co., 48 Me. 291 (1860). The defendant was the owner of a house, one of the windows of which, in an upper story, looked into a passage-way which separated the house from the neighboring premises. The plaintiff was lawfully in the passage-way, loading a truck, when a ladder, inside a room on that story, from some unexplained cause, fell against and broke the window, and a piece of the glass fell into the plaintiff's eye. There was no evidence as to the manner in which

the room within which the ladder was, was used by the defendant, or as to how the ladder got there. Held, that there was no *prima facie* evidence of negligence against the defendant. Higgs v. Maynard, 1 Harr. & R. 581 (1866). Held, on motion to set aside the nonsuit, that the nonsuit was right, and, to make the defendants liable, there should have been affirmative evidence of negligence. Higgs v. Maynard, 14 L. T. (N. S.) 332 (1866). The defendant exposed in a public place, for sale, unfenced and without superintendence, a machine which might be set in motion by any

On the platform of a railway station there were two doors in close proximity to each other; the one for necessary purposes had posted over it the words, "For Gentlemen;" the other had over it the words, "Lamp Room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he could find it, and, having received a direction, by mistake opened the door of the "Lamp Room" and fell down some steps and was injured. In an action against the railway company, it was held, that in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was no evidence of negligence on the part of the company.³

passer-by, and which was dangerous when in motion. The plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed. Held, plaintiff could *not* maintain an action for the injury. *Mangan v. Atterton*, L. R., 1 Exch. 239 (1866). A railway was crossed by a public footway, on a level, and was protected by gates on each side of the line, and caution boards were placed near the gates. The view of the line from one of the gates was obstructed by the pier of a railway bridge crossing the line; but, on the level of the line, it could be seen for 300 yards each way. A woman approaching the line by that gate was detained by a luggage train on her side, and, immediately on its having passed, crossed the line and was run down and killed by a train coming along the other line of rails. There was no evidence of negligence in the mode of running the trains. Held, there was no evi-

dence of negligence on the part of the company to go to the jury. *Stubley v. London &c. Ry. Co.*, L. R. 1 Exch. 13 (1865).

³*Toomey v. London &c. Ry. Co.*, 3 C. B. (N. S.) 146 (1857). The defendant bought a horse, and the next day took him out to "try" him in Finsbury Circus, a much-frequented thoroughfare. From some unexplained cause, the horse became restive, and, notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement and killed a man. Held, *no* evidence of negligence which the judge was warranted in submitting to the jury. *Hammock v. White*, 11 C. B. (N. S.) 588 (1862); 31 L. J. C. P. 129. The defendant was a maker of locomotives, and the plaintiff was in his employ. An engine was being hoisted for the purpose of being carried away by a travelling-crane, moving on a tramway resting on beams of wood supported by piers of brickwork. The piers had been newly repaired and the brickwork was fresh. The piers gave way, the engine fell and plaintiff was in-

§ 286. The same subject continued — Illustrations.— The staircase leading from a railway station to a highway — being otherwise unobjectionable — had, at the edge of each step, a

jured. This was the first time the crane had been used. Held, no evidence of liability or negligence to be submitted to the jury, or of personal negligence on the part of the defendant, as there was nothing to show that he had employed unskillful or incompetent persons to build the piers, or that he knew or ought to have known that they were unsafe. *Feltham v. England*, L. R., 2 Q. B. 33 (1866). The defendant had on his premises, gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. The plaintiff, a workman in the employ of the defendant, passed through the gates when open, but, on his return, one of them was closed, and, shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to show how this happened, nor any evidence that the manager or other persons employed by the defendant were incompetent. It was held that the defendant was not liable, as the plaintiff had not shown that the persons employed by the defendant were incompetent. *Allen v. New Gas Co.*, L. R., 1 Exch. 251 (1876). A public footway crossed a railway on a level, and the plaintiff, while crossing on the footway in the evening, after

dark, was knocked down and injured by a train of the defendants, on the crossing. He stated in evidence, at the trial, that he did not see the train until it was close upon him; that he saw no lights on the train and heard no whistling. He stated, also, that he did not hear any caution or warning given to him by any servant of the company. The driver and fireman of the engine were called on behalf of the company, and stated that there were lamps on the engine and train, which were lighted in due course, on the night in question, at the commencement of the journey, and which, if lighted, could be seen for a considerable distance by any one standing at the crossing. A porter in the defendant's employ also stated that he had seen the plaintiff at the crossing on the night in question, and had called to him not to cross. The judge, at the trial, ruled that there was evidence to go to the jury of negligence on the part of the defendants, which caused the injury to the plaintiff. Held, on appeal, no evidence of negligence to go to the jury, *Cockburn, C. J.*, and *Cleasby, B.*, dissenting. *Ellis v. Great Western Ry. Co.*, L. R., 9 C. P. 551 (1874). J. was a passenger by a railway. The carriage in which he rode was full. At Station G., three persons forced themselves in and were obliged to stand. There was no evidence that a complaint in

strip of brass, which, originally, had been roughened, but which had, from constant use, become worn and slippery. The staircase was about six feet wide, and had a wall on each side but no handrail. The plaintiff, a passenger by the railway, who was a frequent traveller by the line, in ascending from the station, slipped and fell upon the stairs, and was hurt. In an action charging the company with negligence, in not providing a reasonably safe and convenient staircase, the witnesses for the plaintiff stated that, in their opinion, the staircase was unsafe; one of them, a builder, suggested that brass nosings on the steps were improper, and that lead would have been better, because less slippery, and that there should have been a handrail. It was held, that there was no evidence of negligence to go to the jury.⁴ In an action for negligence against a railway

this matter had been made to the railway officials, or that they knew of the fact. At Station P., some other persons opened the door of the carriage, shut it again and went away. There was afterwards a rush on the platform, and other persons opened the door of the carriage. J. stood up to prevent their entering. The train moved. J., to prevent himself from falling, put his hand upon the edge of the door of the carriage. At that moment a railway porter came up, pushed away the persons trying to get in, and slammed the door to, in doing which J.'s thumb was caught and crushed. Held, this evidence did *not* establish such negligence on the part of the company as could be said to have occasioned the injury, and the judge ought so to have directed the jury. *Metropolitan Ry. Co. v. Jackson*, L. R., 3 App. Cas. 193 (1877); L. R., 2 C. P. D. 125 (1877).

⁴ *Crafter v. Metropolitan Ry. Co.*, L. R., 1 C. P. 300 (1866). A water company is not negligent

for an escape of water from their pipes, because their precautions proved insufficient against the effects of a winter of extreme severity, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. *Blyth v. Birmingham Water Works Co.*, 11 Exch. 781 (1856). Action against a railway company for the death of one D., an engine driver in their employment, alleging that they negligently employed one R., an incompetent person, as switchman, and that, by his incompetency, the collision occurred. It appeared that R. neglected to raise the semaphore at the east end of Stratford station, so as to prevent D.'s train, going west, from entering the yard, while a freight train was coming from the west, and thus caused the accident. According to the testimony on both sides, R. was an intelligent man, employed at work which, one witness said, he could learn in a day, another in two or three weeks, and, after being a

company, the plaintiff proved that he went to their station for the purpose of travelling by their railway, and made some inquiries respecting the departure of trains, and was directed by a porter of the defendants to look at a time-table suspended on a wall under a portico of the station. While there, a plank and roll of zinc fell through a hole in the roof, upon the plaintiff, and injured him, and, at the same time, a man was seen on the roof of the portico. The judge at the trial nonsuited the plaintiff. On appeal it was held that there was no evidence that would have justified the jury in finding the defendant was guilty of negligence, and the nonsuit was right.⁵ The plain-

week about the yard, he had performed this work regularly for two weeks without complaint, until this accident. A verdict having been found for the plaintiff, held, no evidence to go to the jury that defendants negligently employed an incompetent person. *Deverill v. Grand Trunk Ry. Co.*, 25 Up. Can. Q. B. 517 (1866). A child was seen upon a railroad track by the engineer of an approaching train, then 450 feet away. Everything possible was done to stop the train, but it could not be stopped within that distance, and the child was injured. Common brakes were used on the train. Held, that there was no evidence of negligence to be submitted to a jury. *Ex parte Stell*, 4 Hughes, 157 (1880). A lame boy, eight years old, climbed upon an engine as it was moving slowly through a street in a city. The engineer at once stopped the engine, with a jerk, the fireman calling to the boy to hold on. The boy either lost his hold or jumped, and was killed. Held, there was no evidence of negligence to be submitted to a jury. *Miles v. Atlantic &c. R. R. Co.*, 4 Hughes, 172 (1880).

⁵ *Welfare v. London &c. Ry. Co.*, L. R., 4 Q. B. D. 693 (1869). When a train is run so closely behind another as to make the statutory signals of warning at highway crossings unavailing as means of warning to travellers, the railroad company is guilty of negligence; the court has a right to instruct, as a matter of law, that a failure to give the statutory signals at public crossings constitutes negligence. *Chicago &c. R. R. Co. v. Boggs*, 101 Ind. 522 (1884). A boy four years old, accompanied by his two sisters, one five years old and the other eleven, left his home for the purpose of going to a shop on an errand. The elder sister went into the shop, which was on a public street, leaving the boy and the younger sister on the sidewalk of the street. While in the shop, she was informed by her younger sister that the boy had been run over and injured by a horse and buggy, and, on coming out, she found him sitting on the curbstone of the sidewalk on the opposite side of the street, in an injured condition. Held, in an action for the injury, that there was no evidence of due care by the plaintiff or of negligence by

tiff's wife, on a dark night and in a snow-storm, proceeded slowly, accompanied by another female, to cross a crowded thoroughfare, whilst the defendant's omnibus was coming up on the right side of the road, and at a moderate pace, and with abundant time for the woman to get safely across if nothing else had intervened; but, in turning back to avoid another vehicle, they returned and met the danger. It was held, that the case should not be submitted to the jury, as there was no evidence of negligence.⁶

the defendant. *Stock v. Wood*, 136 Mass. 353 (1884). Evidence that a chore-woman, directed by the wife of her employer to wash clothes in his house, found the tub bottom up, turned it over, put into it the clothes and a rubbing-board, drew a small quantity of water from a kettle into a dipper and poured it into the tub, into which, also, a pailful of water was poured by the wife, and then, putting her hands into the tub and rubbing the clothes against the board, was severely cut in one hand by a fragment of glass, which, on examination, was found in the tub, is *not* sufficient evidence of negligence of the defendant to be submitted to the jury. *Flynn v. Beebe*, 98 Mass. 575 (1868).

⁶ *Cottin v. Wood*, 8 C. B. (N. S.) 568 (1860). One who employed a boy under fourteen years old to attend a hemp-carding machine in a cordage factory, without pointing out to him the danger of his exposure to certain gearing, in which his hand was caught and injured, was held guilty of negligence. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572 (1869). Where the evidence showed that a passenger was injured while sitting in his seat in a railroad car, and resting his head on his arm, which rested on the window-

sill of the car, by the car coming in contact with the corner of a wrecked car, which had not been sufficiently removed from the track, held, negligence on the part of the railroad company. *Winters v. Hannibal &c. R. R. Co.*, 39 Mo. 468 (1867). In the absence of any ordinance prohibiting exterior basement stairways or requiring them to be guarded by a gate, the leaving of the entrance open at the end and for the width of the top step is not negligence. *Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85 (1878); 73 Mo. 219. No rate of speed of a railroad train is negligence *per se*. *Young v. Hannibal &c. R. R. Co.*, 79 Mo. 336 (1883); *Powell v. Missouri Pacific Ry. Co.*, 76 id. 80 (1882). Defendants owned and worked an iron mine. The ore was taken out of the mine upon cars drawn upon a track by a cable, to which the car was attached by a hook. Two cars were used, one of which was loaded while the other was being drawn out, and, on return of the empty car, the hook was shifted to the loaded one. As an empty car was descending, the hook in some way became detached, and plaintiff's intestate, a servant, was struck and killed by the car. In an action to recover

§ 287. The same subject continued — Illustrations.— The plaintiff was a passenger on the defendants' railway from A. to B. While the train was passing through B. station, the company's servants called out the name of the station, and shortly

damages it appeared that in other mines as well as in this one, there were two cars thus operated; the hook was always used on account of the facility with which it could be changed from one car to another. It had been used in this mine over a year, night and day, without the happening of any previous accident of the kind. Held, that the evidence did not justify an inference of negligence on the part of the defendants, and that a refusal to nonsuit was error, *Ruger, C. J., and Danforth, J., dissenting. Burke v. Witherbee*, 98 N. Y. 562 (1885). Defendant leased a building, which was designed for public entertainments, to one K., to be used for the purpose of a pedestrian exhibition, the tenant to make any and all such changes in the interior of the building, its appointments and fixtures, as he might see fit. There was no agreement on the part of the landlord to make any changes or repairs. There was at the time a gallery in the building, which was built under the supervision of an architect, to accommodate a limited number of people. It was divided into boxes, in each of which was a table and chairs, so that the occupants could be served with refreshments while witnessing the performance. The structure was suitable for this purpose, and had been so used when various festivals were held in the building, a higher price being charged for persons entering the gallery than

for admission to other parts of the building, but it was not suitable for such an exhibition. The tables and chairs were removed, and during the exhibition the same price was charged for admission to the gallery as to the rest of the building. The boxes were crowded with noisy and turbulent people, stamping and keeping time with the music; in consequence thereof the gallery fell, and plaintiff, who was beneath it, was injured. In an action to recover damages for the injuries, it was held by a majority of the court that in the absence of evidence tending to show that the defendant knew, or had reason to suppose, that there was some defect in the gallery, or that it was of insufficient strength to hold the number of people who could be contained therein, or that it would be used in such a way as to endanger its security, the testimony failed to show any actionable negligence, and that the plaintiff was properly nonsuited; *Ruger, C. J., Danforth and Finch, JJ., dissenting. Edwards v. New York &c. R. R. Co.*, 98 N. Y. 245 (1885). It is culpable negligence on the part of a railroad corporation not to stop a train entirely at a regular station to which it had sold a ticket, and give a passenger time and opportunity to alight. It is also negligence for its officers to induce a passenger to leave a train while in motion. *Bucher v. New York &c. R. R. Co.*, 98 N. Y. 128 (1885).

afterwards the train stopped. The carriage in which the plaintiff travelled, stopped a little way beyond the platform, and several carriages and the engine, which were in front of that carriage, stopped at some distance from the platform. The plaintiff, who was well acquainted with the station, in alighting from the carriage was thrown down and injured, in consequence of the train being backed into the station for the purpose of bringing the carriages alongside the platform. A very short interval elapsed between the time that the train stopped and the time it was backed into the station. It was held, that there was no evidence of negligence on the part of the company to render it liable in an action.⁷ A child between ten and eleven years of age, was permitted to walk in the street in the daytime, within sixty feet of her father's house, when there was no particular reason to apprehend danger, and in a street almost entirely unused, would not, as a matter of law, be held evidence of negligence on the part of the parent.⁸ The defendant, for the purpose of a concert, hired a public hall and employed a person to decorate it. Among the decorations was a bust placed on the outside of a balcony. The plaintiff sat in a seat on the floor of the hall, immediately under the bust. The audience were requested, by the program, to rise at a certain part of the concert, and when they did so the bust fell from its place and injured the plaintiff. The plaintiff offered no evidence as to the manner in which the bust was secured. It was held, that the mere fact that the bust fell was not sufficient evidence to go to the jury, of the defendant's negligence.⁹

§ 288. The same subject continued — Illustrations.— Where there was a well on one of the streets of the city of Brooklyn,

⁷ *Lewis v. London &c. Ry. Co.*, L. R., 9 Q. B. 66 (1873). Proof that a woman crossing the south track, at a station, to get aboard a passenger train that had slowed up, going west, on the north track, was struck and killed by a freight train going east, at the rate of ten miles per hour, held, negligence on the part of the railroad company. *Terry v. Jewett*, 17 Hun, 395 (1879). In an action

against a railroad company for an accident at a crossing, it is error to leave to the jury to determine whether the omission to have a flagman at that point was negligent. *Houghkirk v. Delaware &c. Canal Co.*, 92 N. Y. 219 (1883), reversing 28 Hun. 407.

⁸ *Karr v. Parks*, 40 Cal. 180 (1870).

⁹ *Kendall v. City of Boston*, 118 Mass. 234 (1875).

level with the grade of the sidewalk, and usually covered with a wooden cover, having a square opening in the center, which was also covered with a lid, opening and shutting on leather hinges, and the intestate, a child four years of age, was found dead in the well, within half an hour after leaving home, held, the plaintiff was bound to show how the accident occurred, and to throw some light upon the cause which led the child to the vicinity of the well, and the condition of the opening into the well, and whether it was closed or not when the deceased came there. Merely showing the existence of the well, with its covering, and the child being found in the water, was not sufficient to enable the plaintiff to recover.¹⁰ Plaintiff was injured while attempting to cross the railroad track at night in front of three gravel cars, which were being lawfully pushed in front of a locomotive. The cars were moving at a reasonable and lawful rate of speed, the headlight of the engine was in proper condition and lighted, a brakeman was on the extreme front of the train with a lighted lantern, and the engine bell had been rung constantly while the train was passing, from a point more than 230 feet distant, to the place of the injury. It was held, that the railroad company was not guilty of any negligence which caused the injury.¹¹

¹⁰ *Lehman v. City of Brooklyn*, 29 Barb. 234 (1859).

¹¹ *Bohan v. Milwaukee &c. Ry. Co.*, 61 Wis. 391 (1884). In an action against a railroad company by the parents of A., a boy six years of age, to recover damages for his death, it appeared from the evidence that A. was standing at the back door of his father's house, about ninety feet from the railroad; that a coal train approached, upon the last car of which two small boys were riding by permission of the brakeman; that these boys motioned to A. to join them, whereupon he ran from the house, ascended a flight of eight steps leading up the railroad embankment, and climbed on the said last car; that immediately afterwards his hat fell off, and, in his endeavor to recover it, he fell under the car and was fatally injured. The brakeman was at the time on the forward bumper of the rear car, and there was no evidence that he saw A. It further appeared that A.'s mother left him in charge of his older sister, and told him not to go out, and that while the sister was in a pantry getting something for his breakfast, he went out the back door. The court below granted a compulsory nonsuit. It was held that there was no evidence of such negligence on the part of the company's servants as to warrant the submission of the case to the jury, and, therefore, the nonsuit

§ 289. Questions of fact — Illustrative cases.— Whether negligence is a question for the court or for the jury must be determined by the facts of the particular case. Negligence is, in all cases, in a certain sense, a question of fact for the jury — that is, it is for the jury to determine whether the facts bearing upon the question exist or not. But when the facts are undisputed, or are so clearly proved as to admit of no doubt, it is the duty of the court to apply the law without submitting the question to the jury. This involves no invasion of the province of the jury, nor any infringement of their legitimate functions, any more than when the court passes upon a demurrer to the evidence, or on motion for new trial upon the ground of the want of any evidence to sustain the verdict of the jury.¹² What may be negligence under some circumstances and conditions, may not be so under others. It is not a fact to be testified to, but only can be inferred from the *res gestae* from the facts given in evidence. Hence it may, in general, be said to be a conclusion of fact, to be drawn by the jury, under proper instructions from the court. It is always so where the facts, or rather the conclusions, are fairly debatable, or rest in doubt.¹³

was properly granted. *Woodbridge v. Delaware &c. R. R. Co.*, 105 Pa. St. 460 (1884). It is not negligence for a railroad company to run its trains over a public crossing in the open country at the rate of thirty miles an hour. It is only the force of special circumstances that requires a less rate of speed. *Reading &c. R. R. Co. v. Ritchie*, 102 Pa. St. 425 (1883). The conductor, engineer, fireman and brakeman having testified that the brakeman stood on the forward end of the train with a lighted lantern, and that the bell was constantly ringing while the train was passing from a point more than 230 feet distant to the place of the injury, the testimony of the plaintiff and several other witnesses who looked only casu-

ally at the train, that they did not hear the bell or see the lantern, is held to be at most a mere *scintilla* of evidence, and not to have justified the submission of those questions to the jury, or to have warranted a special finding that no one stood on the forward end of the train with a lantern. *Bohan v. Milwaukee &c. R. R. Co.*, 61 Wis. 391 (1884).

¹² *Barton v. St. Louis &c. R. R. Co.*, 52 Mo. 258 (1873).

¹³ *Langhoff v. Milwaukee &c. Ry. Co.*, 19 Wis. 497 (1865). Where an engineer had a crane worked on a tramway, supported on piers of brickwork, which were of insufficient strength, and which gave way, and then caused an accident to one of the men engaged in working the crane, held, that there was evidence of

At a level crossing, plaintiff's evidence showed that it was a dark, foggy morning at the time of the accident, the railroad was obscured by the smoke from neighboring smelter works, the plaintiff exercised due caution by looking up and down the line, the engine had no light, and the engine driver did not whistle or give any notice of his approach. Held, considering the darkness, it would have been a reasonable precaution to whistle before coming to the crossing, and, therefore, there was some evidence to go to the jury, of negligence on the part of the defendant.¹⁴

negligence for which the employer was liable. *Feltham v. England*, 4 Fost. & F. 460 (1865). Suit brought where plaintiff's intestate had lost his life by reason of a large stone being placed on the roof of a mine, in so dangerous a position that it fell on the workman when engaged in digging out the coal, and killed him on the spot. Held, question of negligence should be submitted to the jury. *Paterson v. Wallace*, 1 Macq. H. of L. 748 (1854). Where there are two modes of doing a work in a public highway, from which damage *may* result to a passer-by, the one mode more dangerous than the other, though both are usual modes, it is for the jury to say whether the adoption of the former amounts, under all the circumstances, to negligence. *Cleveland v. Spier*, 16 C. B. (N. S.) 399 (1864). A railway crossed on a level a public carriage and footway at a spot which, from the fact of there being a considerable curve in the line and a bridge near by, trains coming in one direction could not be seen, which was peculiarly dangerous. There were gates across the carriage-way which

were kept locked, but the footway was protected only by a swing-gate on either side. No person being there to caution people passing, the plaintiff, while using the footway, was knocked down by a passing train and injured. Held, it was properly left to the jury to say whether the company had been guilty of negligence. *Bilbee v. London & C. Ry. Co.*, 18 C. B. (N. S.) 584 (1865). In an action against a dock company for injury to the plaintiff by their alleged negligence, the plaintiff proved that he was an officer of the customs, and that whilst in the discharge of his duty he was passing in front of a warehouse on the dock and six bags of sugar fell upon him and he was injured. Held, reasonable evidence of negligence to be left to the jury. *Scott v. London & C. Docks Co.*, 3 Hurlst. & C. 596 (1865).

¹⁴ *James v. Great Western Ry. Co.*, L. R., 2 C. P. 634, n. (1867). The defendants, a railway company, had on their platform, standing against a pillar which passengers passed in going to and coming from the train, a portable weighing machine, which

§ 290. The same subject continued — Illustrations. — Defendant negligently left his horse and cart unattended in the street. Plaintiff, a child seven years old, got upon the cart in play. Another child incautiously led the horse on and plaintiff was thereby thrown down and hurt. Held, that it was properly left to the jury whether defendant's conduct was negligent.¹⁵

was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas day, inquiring for a parcel, was driven by the crowd against the machine, caught his foot on it and fell over it. Held, there was evidence of negligence to go to the jury, on the part of the company. *Cornman v. Eastern Counties Ry. Co.*, 4 Hurlst. & N. 781 (1859). The deceased, a boy selling newspapers, got on a street railway car, at the rear end, and passed through the car to the front platform, where the driver was standing. He stepped to one side, behind the driver, and fell off or disappeared from the car — there being no step on that side — and was killed by the car running over him. He had said, just before, that he was going on some distance further in the car, and the conductor, at the time, stated that he had reported the want of a step to the owners of the railway, but it had not been attended to. There was plenty of room in the car, but it was proved that passengers were always allowed to stand on the platform. It was

not shown that the deceased had either paid or been asked for his fare, but it appeared that newsboys were allowed to enter the cars to sell newspapers without being charged. Held, evidence for the jury of negligence on the part of defendants, in the absence of the step, and no such contributory negligence on the part of the deceased as should, as matter of law, prevent the plaintiff's recovery. A nonsuit was set aside. *Blackmore v. Toronto Street Ry. Co.*, 38 Up. Can. Q. B. 172 (1876); reversed on appeal, on the ground that deceased was a mere licensee or volunteer.

¹⁵ *Lynch v. Nurdin*, 1 Q. B. 29 (1841). In an action against a surgeon for malpractice in amputating an arm above instead of below the elbow, several medical men of repute approved of the defendant's course. The jury found for the plaintiff. A new trial was granted, on the ground that the case should not have been submitted to the jury. *Jackson v. Hyde*, 28 Up. Can. Q. B. 294 (1869). A child, six years of age, and living with his parents, brought suit against a railroad company to recover damages for an injury sustained upon a turntable belonging to the said company. The turntable was in an open space about eighty rods

The plaintiff who was walking in a public street, passed the defendant's shop, when a large barrel of flour fell upon him from a window above the shop, and severely injured him. It was held, that there was sufficient *prima facie* evidence of negligence for the jury, and to cast on the defendant the onus of proving that the accident was not caused by his negligence.¹⁶

from the company's depot, in a hamlet or settlement of 100 to 150 persons. Near the turn-table was a travelled road. On the railroad ground, which was not inclosed or visibly separated from the adjoining property, was situated the company's station-house, and about a quarter of a mile distant from this was the turn-table on which the plaintiff was injured. There were but few houses in the neighborhood of the turn-table, and the child's parents lived in another part of the town, and about three-fourths of a mile distant. The child, without the knowledge of his parents, set off with two other boys, the one nine and the other ten years of age, to go to the depot, with no definite purpose in view. When the boys arrived there, it was proposed by some of them to go to the turn-table to play. The turn-table was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis. Two of the boys began to turn it, and in attempting to get upon it the foot of the child injured, who was at the time upon the railroad track, was caught between the end of the rail on the turn-table, as it was revolving, and the end of the iron rail on the main track of the road and was crushed. Held, negligence prop-

erly submitted to the jury. *Sioux City &c. R. R. Co. v. Stout*, 17 Wall. 657 (1873). See § 81. Plaintiff was injured by reason of some one having placed a push-car on defendant's railroad track. The car had been left unlocked by the side of the track by defendant's servants. Held, that the question of whether negligence was imputable to the railroad company was for the jury. *Harris v. Union Pacific Ry. Co.*, 4 McCrary, 454 (1882). Plaintiff's team, in being turned about in the street of a city, came into collision with defendant's team, which had been following behind. Each charged that the negligence of the other caused the accident. Held, the question of negligence and of contributory negligence was for the jury. *Bierbach v. Goodyear Rubber Co.*, 14 Fed. Rep. 826 (1882); 15 *id.* 490 (1883). A fireman of an engine, while in the performance of his duty, was struck by a telegraph pole, which was only a foot from the engine. In his action for negligence, held, the question of negligence on the part of the company in allowing the pole to stand so near the track was a question of fact for the jury. *Hall v. Union Pacific Ry. Co.*, 16 Fed. Rep. 744 (1883); 5 McCrary, 257 (1883).

¹⁶ *Byrne v. Boadle*, 2 Hurlst. & C. 722 (1863). Whether it is neg-

Where defendant was engaged in building a railroad, and left small copper cartridges, containing an explosive compound,

ligence for an engineer to run his train at a stated number of miles per hour, is generally a mixed question of law and fact, dependent upon many controlling circumstances, such as the condition and structure of the road, its grade, straightness or curvature, the character and capacity of the brakes, and when there is no evidence as to any of these controlling facts, it is properly left to the jury to decide whether he was guilty of negligence in running his train at the rate of thirty-five or forty miles per hour at the time of the accident. *East Tennessee &c. R. R. Co. v. Bayliss*, 74 Ala. 150 (1883). Plaintiff got on a train at Forrest City, with the intention of going to Brinkley. Just on the outskirts of Brinkley the track of the Texas and St. Louis railway, popularly known as the "Paramore Road," crosses that of the Memphis and Little Rock railroad. When the train on which plaintiff was a passenger had arrived within a short distance of the station at Brinkley, the brakeman, as usual, called out the name of the station. The train ran on a few paces further, and, arriving at the crossing of the Texas and St. Louis railway, stopped a few moments, as is customary, before crossing the track of another road. The night was dark. The plaintiff thought he had reached his destination. He arose from his seat, went out on the platform and looked out on one side. He saw no platform or

other indication of a depot, only a bright light ahead, which he took to be the headlight of a locomotive. The plaintiff then went across the platform to the other side. Just at this time the train began to move slowly forward. The plaintiff, supposing that he was about to be carried beyond his station, stepped off, fell and was taken in an insensible condition to a doctor's office. Held, the question of defendant's negligence should be submitted to the jury. *Memphis &c. Ry. Co. v. Stringfellow*, 44 Ark. 322 (1884). The defendants owned and operated a street railway, the cars of which, drawn by horses, passed along its tracks at stated intervals only a few minutes apart. The plaintiff was employed by a gas company, and while so employed he dug a ditch running between the two tracks of the defendant's road and at right angles therewith. He knew that the cars passed frequently, but he did not watch them. While he was in the ditch, two or three feet from the track, a car approached. When immediately opposite the plaintiff, the horses plunged or shied, and one of them fell into the ditch and upon the defendant, injuring him severely. He brought an action against the railway company, in which the jury found a verdict for the defendant. Held, a proper case to be submitted to the jury as a question of fact. *Fernandez v. Sacramento City Ry. Co.*, 52 Cal. 45 (1877).

near the plaintiff's residence, which were picked up by plaintiff's children, and while the mother was taking one of the cartridges from the child, it exploded, lacerating her hand, it was held, that the question of negligence was one of fact for the jury.¹⁷

¹⁷ *McNamara v. North Pacific R. R. Co.*, 50 Cal. 581 (1875). In an action against a city for injury to the plaintiff, occasioned by the alleged neglect of the city to keep a sidewalk in proper condition, it appeared that a person who was erecting a building in the city did, with the knowledge and consent of the city authorities, in order to reach the basement of his building, make an excavation under the sidewalk. This excavation was kept covered with loose boards, except when access to the basement was necessary. The boards, or a portion of them, were removed, and replaced after the necessity had passed. The opening was thus covered up until six o'clock of the evening of the injury, after which time some person unknown removed the covering, and the plaintiff — it being very dark that night — in going home, fell into the basement and broke his shoulder. Held, the question whether this covering of boards, which could be easily removed, afforded sufficient security, was properly left to the jury, and this court concurs in the opinion that it was *not* sufficient. *City of Sterling v. Thomas*, 60 Ill. 264 (1871). An employe of a railroad company was killed by the falling of a bank of earth which he was engaged in excavating. His administrator brought suit for dam-

ages against the company, on the alleged ground of a want of proper care on the part of the agents of the company in charge of the work, indicating the manner in which it should be done. The facts, as shown by the testimony, were substantially these: A number of laborers were engaged in excavating a hill, under the direction of a foreman. The bank at the point where the accident occurred was sixteen to twenty feet high and composed of clay commonly called "joint clay." The deceased was twenty-eight years of age. The manner of doing the work and as directed by the foreman, was by undermining the bank by digging under from two to three feet and prying the bank off from the top. That was not the proper and safe way to take down the bank. The foreman had control of the men, and could discharge them for disobedience of orders. On the morning of the accident, the foreman, as he was about to go elsewhere, cautioned the men about the danger. Two days previously, the superintendent of the road told the men that the way they were doing the work was dangerous, that they must not cave it off that way, and that they must not dig under so far. In the forenoon of the day of the accident, several of the men — the deceased himself included — were

§ 291. The same subject continued — Illustrations.— Where a boy ten years of age was employed in a factory, and was injured by being caught in machinery which, it was claimed, ought to have been covered in such a manner as to prevent such an accident, it was held, that the question, whether at his age he had a sufficient understanding of the hazards of the employment to bring him within the general rule, was one of fact to be decided by the jury.¹⁸ The question as to the proper

speaking of the bank getting dangerous. One man left the place on that account, and another went to work somewhere else. This the deceased could have done if he had desired, as he was not required to work at that particular place, but chose it for himself, and, continuing to work there, the bank fell upon him and killed him. The court below, on this state of the case, excluded all the plaintiff's evidence from the jury and directed a verdict for the defendant. Held, this was proper. There was no sufficient ground of recovery, the deceased having voluntarily continued in the place of danger, with full knowledge of the peril he was in. *Simmons v. Chicago &c. R. R. Co.*, 110 Ill. 340 (1884). A brakeman was injured while attempting to pass from one car to another, the car to which he passed having no ladder or handles, as he supposed it to have. He knew that some of the cars that he had to use were deficient in these appliances. Held, that the question of negligence on the company's part, and of contributory negligence on his own, were questions of fact for the jury. *Chicago &c. R. R. Co. v. Warner*, 108 Ill. 538 (1884).

¹⁸ *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548 (1861). H., employed as an engineer on a railroad, was killed by the explosion of the locomotive of which he had charge. An action was brought against the railroad company for the use of the widow and minor child of the deceased to recover damages sustained by them by reason of his death. There was no evidence of negligence on the part of the defendant in the selection of faithful and competent employes. The ground of the action and the liability of the defendant rested on the alleged facts that the engine was unsound and unsafe when it was purchased and put upon the road, and so continued till the time of the accident, and that the agent of the defendant, by whom it was purchased, did not exercise ordinary care in purchasing and procuring a sound and safe engine. Evidence was offered by the plaintiff as to the purchase of the engine, the explosion of which caused the death of H. The defendant proved that the engine was repaired about a month before its explosion, and alleged that there was no evidence of the original and continued unsoundness of the engine, and of the

construction of a railroad platform, and its construction with reference to the track, in a suit by an employe against the company, is a question for the jury.¹⁹ It is a question of fact

alleged negligence of the defendant in procuring it. Held, that there was evidence on these questions legally *sufficient* to go to the jury, and they were properly submitted for their decision. *Cumberland &c. R. R. Co. v. State*, 45 Md. 229 (1876). In an action by a servant to recover for a personal injury caused by the fall of an elevator used in the master's business for hoisting goods, and upon which the plaintiff was ascending at the time of the injury, there was evidence that the defendant had instructed his foreman to warn the men of a rule of the house against going upon the elevator. Held, the questions whether any precautions were required, and whether the instructions given to the foreman were a sufficient precaution, were for the jury. *Avilla v. Nash*, 117 Mass. 318 (1875). In an action by a workman against his employer for injuries caused by the falling of staging, upon which the plaintiff was at work repairing a building, the evidence tended to show that the plaintiff went on the staging by the defendant's direction; that the staging was insecure, in consequence of being constructed of unsuitable materials, or by neglect to fasten it together sufficiently; that the staging was built before the plaintiff began work, by persons who were afterwards his fellow workmen, and that the defendant directed what lumber was to be

used therefor. It was not contended that the staging was built under the direct personal supervision of the defendant, but there was evidence that he superintended the work generally. Held, a jury would be warranted in finding a verdict for the plaintiff. *Arkerson v. Dennison*, 117 Mass. 407 (1875).

¹⁹ *Chicago &c. R. R. Co. v. Clark*, 11 Ill. App. 104 (1882). In an action of tort for injuries sustained by the plaintiff by the falling of a bale of goods from a wagon, the evidence showed that, at the time of the injury, the plaintiff was upon the sidewalk, which was nine feet wide, in the act of loading a case of goods upon a truck; that he saw the wagon and knew that it was backed up for the purpose of unloading; that the defendant's servant in charge of the wagon unfastened, in a proper place to unload, but without giving any warning, the rope by which the bales upon the rear of the wagon were bound thereto; that the plaintiff could not see the servant unfastening the rope, and did not look to see what he was doing; that when the rope was unloosed, one of the rear bales fell upon the plaintiff, causing the injury. The evidence was conflicting, whether the plaintiff directed the servant to back up. The defendant's servant testified that he unfastened the rope on one side and then went round to the rear of

whether it is negligence on the part of parents to permit their child three and a half years old to be upon a public street unattended.²⁰ In an action by a servant against his master to recover for injuries occasioned by his falling into a barrel of hot water, alleged to have been negligently put by the master upon his premises, it was held, that the question of defendant's negligence, was properly submitted to the jury.²¹

the wagon and unfastened it on the other side; that the plaintiff was not then behind the wagon. The plaintiff testified that he did not see the servant pass round the wagon. At the close of all the evidence, the judge refused to withdraw the case from the jury. Held, proper. *Patrick v. Pote*, 117 Mass. 297 (1875).

²⁰ *O'Brien v. McGlinchy*, 68 Me. 552 (1878).

²¹ *Northcoate v. Bachelder*, 111 Mass. 322 (1873). In an action against a railroad corporation for personal injuries sustained by the plaintiff on a car of the defendant's railroad, the accident being caused by another car in which the plaintiff was riding, while making a "flying switch," there was evidence that, on other occasions, the cars had come together with as much violence. Experts testified for the defendant, that connecting cars in this way was a safe and prudent mode of management. One of them testified, on cross-examination, that there was a great dispute among railroad experts as to the safety of "flying switches." The plaintiff put in no expert testimony on this point. Held, that he was properly allowed to go to the jury on the question whether such mode of connecting the cars, under all the circumstances of the case, was proper. *White v. Fitchburg*

R. R. Co., 136 Mass. 321 (1883). In an action brought by a servant against his master, to recover for personal injuries received by him in breaking and falling through a floor in his master's shop, over which it was his duty to pass, it appeared that he knew that the floor was decayed, and that there were holes in it; but it did not appear that he could have ascertained that the place where he broke through was dangerous without examining parts of the floor not open to his inspection. Held, the court could not say that he was guilty of negligence, and that the question was for the jury. *Huddleston v. Lowell Machine Shops*, 106 Mass. 282 (1871). In an action against a railroad corporation for personal injuries occasioned to the plaintiff, a boy fourteen years old, the evidence tended to show that he, in company with another boy, was driving a horse attached to an open wagon, when it came into collision with the defendant's train at a grade crossing; that the street on which he was riding sloped downward through a cut for 100 feet, until it entered upon the railroad track; that, for a portion of this distance, the smoke-stack of an approaching engine could be seen through a picket fence, and at a distance of from fifteen to thirty-five feet a clear

§ 292. The same subject continued — Illustrations.— If a railroad corporation has made provision for passengers to leave its cars upon one side only of the track, and it is dangerous to leave upon the other side, in an action against the corporation for negligently causing the death of a passenger, while leaving a car on the wrong side, it is a question for the jury whether it was negligence in the corporation not to have provided some means to prevent passengers from leaving on that side, or not to notify them not to do so.²² At the trial of an action

view of the track could be had, and that a train could be heard by a person in that street before it came in sight through the fence. The plaintiff testified that he drove into the street towards the railroad track on an easy trot; that when he came to the crest of the hill, about 100 feet from the track, he pulled up, and afterwards drove at a rate half way between a trot and a walk; that the other boy pointed out to him a train which had been hidden from their view by an intervening building until they were over the crest of the hill; that he looked at the train and then turned to his horse; that the other boy called his attention to the train when he was within from ten to forty-six feet of the track, and that he pulled up his horse, but, thinking he could not stop him, whipped him, drove across and the wagon was struck on the hind wheel; and that there was nothing to prevent his hearing the train except the rattle of the wagon. Both boys, and another witness who heard the train coming while sitting in a house near the track, with the windows shut, before the boys turned to look at the train above mentioned, testified that they did not remember hearing the bell on the engine ring. The

engineer and fireman testified that the bell did ring, but the whistle did not sound, and there was no flagman at the crossing at the time of the accident. Held, that the question whether the plaintiff exercised due care was for the jury. *Tyler v. New York &c. R. R. Co.*, 137 Mass. 238 (1884).

²² *McKimble v. Boston &c. R. R. Co.*, 139 Mass. 542 (1885). In an action against a city for injuries to plaintiff, caused by a defective condition of a sidewalk of the defendant, it appeared that the plaintiff fell through a hatchway in the sidewalk, the door of which was open; that the door was seven and a half feet long and three feet wide, and there was no guard to protect passengers; that the door and hatchway had existed in said sidewalk several years, and had frequently been opened and left open for some minutes. Held, error to nonsuit plaintiff. Negligence should be left to the jury. *Barstow v. City of Berlin*, 34 Wis. 357 (1874). The plaintiff, a woman seventy-two years old, was put off with her trunk at defendant's depot between nine and ten o'clock at night. The depot was not upon any public highway, it was not open or lighted, and there

against a street railway corporation for personal injuries occasioned to the plaintiff, while a passenger in one of its open cars, by being thrown out of the car, it appeared that the defendant was repairing its track at the place where the accident happened; that for this purpose it had removed the paving stones in the street, and at the time of the accident, some of them had not been replaced, and there was evidence tending to show that the absence of the paving stones made the passage at this point dangerous, and that this caused the injuries to the plaintiff. It was held, that there was evidence of the defendant's negligence, which was properly submitted to the jury.²³ A. and his minor son, B., were in the vestibule of their house preparing to set off fireworks, while a procession was passing, when C. fired a rocket from his house opposite, which struck and injured B. It was held, that in an action against C., the ques-

was no one there to give her information, and she was not familiar with the locality. Seeking in the dark the highway on which she knew the house where she was to stay was situated, she failed to find the way of access to such highway, which was across a field, over a stile on one side and through a gate on the other; and, becoming bewildered, she returned to defendant's platform, and afterwards, in trying to reach the other end of the platform to shelter herself from the cold wind, she fell down a flight of three steps on the platform between the part designed for passengers and that designed for freight, and was injured. There was no defect in the platform or the steps, and the injury occurred more than an hour after she first left the platform. Held, the question whether the absence of any light at the depot, or any person to give information, under all the circumstances, was negligence on defendant's part, was properly left to the

jury. *Patten v. Chicago &c. Ry. Co.*, 32 Wis. 524 (1873). Plaintiff, a little girl, walking along a railroad track upon a "switch-path" between the main and side tracks, in attempting to cross one of the side tracks caught her foot, and a freight train backing towards her ran over it. Held, whether plaintiff was on the track at the time of turning the switch leading to the place where she was caught, or of giving the signal, or whether the switchman ought to have seen her before giving the signal, and then have given the alarm sooner than he did, or to have rescued her by his own efforts, or whether the yardmaster should have gone to her relief when he first saw she was in danger, or whether the brakeman on the train acted as his duty required, were all questions peculiarly within the province of the jury. *Townley v. Chicago &c. Ry. Co.*, 53 Wis. 626 (1881).

²³ *Valentine v. Middlesex R. R. Co.*, 137 Mass. 28 (1884).

tions of negligence of C., and the carelessness of A. and B. were rightly left to the jury.²⁴

§ 293. **The same subject continued — Illustrations.**— In an action against a railroad company for an injury to a passenger, who, on a dark night, upon the arrival of a train on the main track next to the station-house, alighted on a narrow platform, between that track and the side track, and, in crossing from the platform to the highway, was struck by an engine backing on the side track, it was held, that the negligence of the defendant should have been submitted to the jury.²⁵ When two per-

²⁴ *Fisk v. Wait*, 104 Mass. 71 (1870). In an action for personal injuries occasioned to the plaintiff while in the defendant's employ, it appeared that the defendant had contracted with the owners to tear down an old brick building; that one of the walls was built of two courses of brick, each four inches in thickness, and that the inner course supported a chimney extending down to the second floor, but not to the ground. There was evidence tending to show that, on the day of the accident, the defendant's foreman discovered a crack between the outer and the inner courses of the brick where the chimney was; that he notified the defendant of it, he being present, in the direction and control of the work; that the foreman called the plaintiff to aid him in putting up braces to prevent the wall from falling, and while they were at work the wall and chimney fell, carrying away a part of the floor on which they were at work, and injuring the plaintiff. Held, that the evidence tended to show personal negligence on the defendant's part, in setting the plaintiff to work in a place of peculiar danger, unknown to the plaintiff,

without any caution, and should have been submitted to the jury. *Ryan v. Tarbox*, 135 Mass. 207 (1883). Plaintiff fell and was injured while going from defendant's meeting-house, after dark, by a path eighteen feet wide, bounded by a wall eight inches above the path at the point where plaintiff fell, a street being on the other side of the wall, two feet below the level of the path. The path was insufficiently lighted, and plaintiff did not see the wall. Held, whether plaintiff was in the exercise of due care, and whether the way was reasonably safe, were questions for the jury. *Davis v. Central Congregational Society*, 129 Mass. 367 (1880).

²⁵ *Gaynor v. Old Colony &c. Ry. Co.*, 100 Mass. 208 (1868). Negligence is a question for the jury, where an iron founder left a truck with hot-iron castings in a street of the city of Boston, between three and four o'clock in the afternoon, where he knew children were accustomed to play, the city ordinances prohibiting the standing of trucks in any street. *Lane v. Atlantic Works*, 107 Mass. 104 (1871).

sons were gunning, and, while one was sitting on the fence, his gun was discharged by pointing it, or by the turning of the rail, whereby the other was wounded. It was held, the court properly left it to the jury to say whether there was negligence.²⁶ While previous knowledge, by one injured, of a dangerous situation or impending danger, from which a person of ordinary intelligence might reasonably apprehend injury, generally imposes upon him greater care and caution in approaching it, the degree of care required is a question for the jury.²⁷ Plaintiff's

²⁶ *Moebus v. Becker*, 17 Vr. 41 (1884). To rebut the presumption of negligence in a railroad company, arising from an accident by which the plaintiff was injured, the defendant offered evidence of the circumstances of the accident, the character and actual condition of the cars, road-bed and track, and of the speed and management of the train, and also evidence of expert witnesses, tending to show that the track was properly managed. Held, to make a case for the jury, upon the question whether defendant exercised due diligence under the circumstances. *Eldridge v. Minneapolis &c. Ry. Co.*, 32 Minn. 253 (1884). Whether it is negligence to leave a horse unhitched is a question to be determined by the jury, from all the facts in the case, under the instruction of the court as to what constitutes negligence; and when the question of negligence arises, it is competent for the party against whom the negligence is charged, to prove that the horse was trustworthy to stand unhitched, under such circumstances as those in which he was thus left. *Griggs v. Fleckenstein*, 14 Minn. 81 (1869). In a suit for damages against a street railway company, where it appeared that a lad of seventeen

years and of sound mind jumped or stepped from the car while in rapid motion, it was held improper to instruct the jury that such action, *per se*, constituted negligence, in law, on the part of the boy. The question of negligence, in such case, should be left to the jury. *Wyatt v. Citizens Ry. Co.*, 55 Mo. 485 (1874). The jury were the judges of the *weight* of the evidence, and it is held, in Missouri, to be error to take a case from the jury if there be any evidence to sustain the issue, *i. e.*, of negligence. *Flori v. City of St. Louis*, 3 Mo. App. 231 (1877).

²⁷ *Palmer v. Dearing*, 93 N. Y. 7 (1883). Whether the action of the conductor of a railroad train in putting a person off the cars while moving very slowly, under all the circumstances of the case, amounted to negligence, was a question to be submitted to the jury. *Meyer v. Pacific R. R. Co.*, 40 Mo. 151 (1867). Where deceased was a hod-carrier, in the employ of defendants, and, while crossing a gangway constructed by the defendants from the third story of one house to the third story of another, the planking of which had a knot in the middle, it broke and threw deceased down, killing him, held, negligence of the de-

intestate, desiring to purchase a "black draught," asked the druggist for "black drops," which, the druggist told him, was

defendants should be submitted to the jury. *Norton v. Ittner*, 56 Mo. 351 (1874). The evidence tended to prove that, when injured, the plaintiff was sitting in the rear car of the train, at or near an open window, and that the injury to his arm was caused by the car coming in contact with a wagon loaded with a skiff. As to the position of his arm at the time — whether inside or protruding out of the window — the evidence was somewhat conflicting. Held, proper to submit the question of negligence to the jury. *Barton v. St. Louis &c. R. R. Co.*, 52 Mo. 253 (1873). Where there is any evidence tending to establish the allegations of negligence in the petition, the court cannot withdraw the case from the jury. *Cook v. Hannibal &c. R. R. Co.*, 63 Mo. 397 (1876). Under the circumstances of this case, it was clearly for the jury to say whether, in attempting to cross a track at the public crossing, one was guilty of negligence, or was in the exercise of ordinary care. In all cases where there is any conflict in the testimony, and, ordinarily, even where there is not, all the facts and circumstances of the case should be submitted to the jury, with proper instructions as to what constitutes ordinary negligence or the want of ordinary care, and what constitutes gross negligence. *State v. Manchester &c. R. R. Co.*, 52 N. H. 528 (1873). Whether it is the duty of a railroad company to warn travellers of the danger in passing a crossing when a locomotive emitting steam is stand-

ing near, is a question of fact for the jury. *Lewis v. Eastern R. R. Co.*, 60 N. H. 187 (1880). The passage of two trains in opposite directions along contiguous tracks in a populous city, so as to meet at or near a crossing properly used by foot passengers, which is without the presence of a flagman, without lessening their speed, held, to justify a jury in determining that the railway company was guilty of culpable negligence, although flagmen were kept at the place designated in a city ordinance, and the speed did not exceed what was authorized for trains by the ordinance. *New Jersey R. R. Co. v. West*, 3 Vr. 91 (1866). A horse-car of the defendant was proceeding upon its railroad without lights or bells on a dark evening in a street of New York city, obstructed by a sewer in the process of construction. The plaintiff, a sober cartman, was found dead upon the track, under circumstances authorizing the inference that he had fastened his horse and was groping in the dark to find a safe passage for his team when struck by the defendant's car. *There was no witness to the accident.* Held, the dangerous tendency of the defendant's conduct was such as, in the absence of any other evidence than the presumption that the plaintiff had the same regard for his safety as other men, to authorize the attributing of the accident to the negligence of the defendant, and a proper case to be submitted to the jury. *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65 (1859). Plaintiff was injured

a poison, but finally put them up in a bottle labelled "black drops," but having nothing on it to indicate the dose or that

by the fall of a wooden awning over a sidewalk upon one of defendant's streets. The awning was constructed in the usual manner by competent mechanics, with timbers of proper form and size, four months prior to the accident. The awning had been injured by a fire engine running against it. It was repaired by a competent mechanic, who did what he supposed necessary to make it safe. A day or two before the accident there had been an unusually heavy fall of snow, and a heavy body of it remained upon the awning. That part of the awning which had been repaired gave way. Defendants requested the court to submit to the jury, in substance, the question whether the fall of the awning was not occasioned by a secret defect, not discoverable, resulting from the injury to it, and by the unusual quantity of snow upon it, and to charge, if the jury so found, defendants were entitled to a verdict. This the judge declined to do. Held, error; that whatever may be the extent and measure of the liabilities of the city government, these were questions of fact which should have been submitted to the jury. *Hume v. Mayor &c. of the City of New York*, 47 N. Y. 639 (1872). Plaintiff's sleigh was upset by striking against a switch laid down by defendant in a street in the city of Brooklyn, to connect its tracks with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or

reasonable; that defendant had put salt on its tracks, which had melted the snow and caused the slush to run down and cover the switch from sight. Accidents had frequently happened to other passing vehicles from the same cause. In an action to recover damages, held, that the evidence justified the submission of the question of defendant's negligence to the jury. *Wooley v. Grand Street R. R. Co.*, 83 N. Y. 121 (1880). Defendant was the owner of a coal mine, under the management of a superintendent, who had full power of control and discretion in conducting the work. Plaintiff, while working in a pit and upon a wall in the course of construction, for the purpose, mainly, of furnishing a place behind which to deposit the refuse material of the mine, was injured by the fall of a mass of rock from an overhanging cliff. In an action to recover damages for the injury, plaintiff's testimony tended to show that there had been, for a long time prior to the accident, a large crack, parallel with and about ten feet back from the upper angle of the face of the cliff, which was plainly visible; that the attention of the superintendent and foreman had been called to it, and they were warned of its dangerous character; that they had instituted an experiment which showed that the crack was increasing in width, but they took no precautions, although practicable, to support the rock while men were working under it. The wall would, when completed, have

the mixture was a poison. It was held, the court erred in not leaving it to the jury to say whether the druggist was guilty of negligence.²⁸

furnished a support, but it required a long time to complete it, and was not then a protection to the laborers at work upon it. The rock which fell broke off at the place where the crack had been observed. Plaintiff's duties did not call him to any place where the dangerous character of the rock was visible, and he was ignorant of it. Held, that a motion for a nonsuit was properly denied, and that a verdict for plaintiff was justified by the evidence. *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368 (1885). Plaintiff's husband leased of defendant a portion of the second story of a house. The stairway leading to that story was covered with oilcloth, in which was a broken spot, on the edge of a step. This defendant, in the contract of letting, and frequently afterwards, agreed to repair. Plaintiff had occasion to go up and down the stairs daily, and knew of the defect and its location. In going down, one morning, her foot caught in the broken oilcloth. She was thrown down and injured. In an action to recover damages, it appeared that plaintiff, at the time of the accident, did not take hold of the banisters and wore a cloak folded around her. The stairway was dimly lighted. Plaintiff testified that defendant's agent had promised her, a day or two before the accident, to immediately repair the defect, and she supposed he had done so. Held, the question of contributory negligence was prop-

erly submitted to the jury. *Palmer v. Dearing*, 93 N. Y. 7 (1883).

²⁸ *Wohlfahrt v. Beckert*, 27 Hun, 74 (1882). In action by a passenger to recover of a horse railroad company for personal injuries occasioned by a grocer's wagon running against the car, there was evidence that the wagon came rapidly down a street intersecting at right angles, and could have been seen by the cardriver 250 feet distant, and that the car might have been stopped in twelve feet. Held, question of negligence for the jury. *Watkins v. Atlantic Avenue R. R. Co.*, 20 Hun, 237 (1880). In action by K.'s administrator against a railroad company to recover for killing of K. by explosion of a locomotive's boiler, there was evidence that K. was fireman, and that the engine was frequently taken to the repair shops for repairs, and would not sustain a full head of steam. Held, the question of the company's negligence was one of fact for the jury. *Kirkpatrick v. New York Central & C. R. R. Co.*, 79 N. Y. 240 (1879). Running a railroad train a little beyond the station before stopping still is not negligence *per se*. *Taber v. Delaware & C. R. R. Co.*, 71 N. Y. 489 (1877). The plaintiff's intestate, who was about nineteen years old, was employed by the defendants in their wall-paper factory, in Buffalo. The building was of brick and five stories high. Workmen were employed on each floor, and the intestate passed from floor to

§ 294. The same subject continued — Illustrations.— In an action brought to recover damages from the defendant, for negligently running over the plaintiff in the street, it appeared that the plaintiff, when crossing at a street corner, was knocked

floor, in discharging his duty, which was to pick up and carry away scraps of paper. The fifth story was divided into two rooms by a partition containing openings through which the employes could pass. In each room there was an elevator, not used, however, for the carrying of workmen. In the front room there were stairs leading down to the fourth floor, and to a scuttle in the roof, but no ladder to reach it. In the rear room there was an iron door leading to the roof of an adjoining building. A fire broke out through the fifth floor, not far south of the scuttle, and set fire to rolls of paper which were hung up in that story to be dried. The fire spread rapidly, cutting off escape from the back room, the stairs, and iron door, and a number of the employes of the defendant, at work upon that floor, were burned to death. Among them was the plaintiff's intestate. An ordinance of the city required every building more than one story high to have a scuttle through the roof and a convenient and suitable stairway or ladder leading to the same. It was held, that the questions as to whether the defendant was not guilty of negligence in failing to provide sufficient means of escape from the fifth floor, in case of fire, and particularly in not furnishing a staircase or ladder leading to the roof, and whether such omission did not cause the death of the intestate, should have been

submitted to the jury. That the question whether or not the intestate, when entering into the employment of the defendants, took the risk of injury which might arise from the omission of the defendants to furnish adequate means of escape in case of fire, should also have been submitted to the jury. That the court erred in granting a nonsuit. *Schwandner v. Birge*, 33 Hun, 186 (1884). Plaintiff's intestate was put off defendant's train by the conductor, for having neither money nor ticket. There was some evidence tending to show that he had bought and lost his ticket. He was put off in a deep cut, when quite drunk, although a passenger offered to pay the fare. He got upon the track and was killed by the train of another corporation, which had the right to run its train over the road. Held, that the question of whether his death was traceable directly to the removal from the train should have been submitted to the jury, and that the court erred in ordering a nonsuit. *Guy v. New York & C. R. R. Co.*, 30 Hun, 399 (1883). The plaintiff and her husband went to a ball ground, and, in passing thereto from a street, crossed the defendant's railroad, walked along an embankment upon which the defendant's tracks were laid. After remaining at the ball ground some twenty minutes, they started to return by the same way. The embankment was nar-

down by defendant's vehicle, which was driven at a rapid rate around the corner. Negligence, whether on the part of the plaintiff or the defendant, is a question of fact for the jury to determine.²⁹ Whether permitting the plaintiff to stand on the

row, the earth not reaching beyond the ends of the sleepers, and the banks descending rapidly to a ditch, which, at the time of the accident, was about half full of water. When about 160 feet from the end of the embankment towards which they were going, they heard and saw a locomotive coming behind them. It was about 640 feet from them, and was running alone at the rate of ten or twelve miles an hour. It could have been stopped in a distance of about 100 feet. The plaintiff and her husband tried to reach the end of the embankment and the wife succeeded in doing so, but the husband was struck by the engine and killed just as he was stepping from the track. In an action by the wife, as administratrix of her husband, to recover damages because of his alleged negligent killing by the defendant, the court directed a nonsuit to be entered. Held, that it was error; that the questions as to the defendant's negligence and the deceased's contributory negligence should have been submitted to the jury. *Remer v. Long Island R. R. Co.*, 36 Hun, 253 (1885).

²⁹ *Williams v. O'Keefe*, 9 Bosw. 536 (1862). A. contracted to build a bridge, and employed the defendant, a skillful builder, and gave him the sole management and control of the work, and of the manner of carrying it on, all the other employes being in all respects subject to his orders.

Under defendant's direction and supervision a scaffold was erected, secured by stay-laths, upon which laborers worked and materials were placed. Some of these laths were removed by direction of defendant, the plaintiff aiding in so doing. Subsequently the scaffold fell, and plaintiff was injured thereby. The manner of constructing the scaffold, and the materials of which it was composed, were described to the jury. Held, the questions as to the negligence of the defendant and the contributory negligence of the plaintiff should have been submitted to the jury. *Fort v. Whipple*, 11 Hun, 586 (1877); an action could be maintained against the principal or the defendant, or against both jointly. The defendant laid its tracks and operated its road through Washington street, between Market and Mulberry streets, in the city of Syracuse. The rails projected about four and a half inches above the paved surface of the street, and the spaces between were not planked or filled in, except at the places where Washington street was crossed by the other streets. The north rail was about ten feet from the north curb of Washington street. The plaintiff's intestate turned into Washington street driving eastwardly towards Mulberry street, to deliver ice at a hotel in the middle of the block. Both sides of the street were lined with buildings used for business pur-

front platform of a car and get off without coming to a full stop, is negligence, is a question for the jury.³⁰ A passenger

poses. While delivering the ice a train came from the east. When the engine came near to the horses they became frightened, and the wagon was backed against the train, whereby the deceased was killed. In an action brought to recover damages for his death, the plaintiff was nonsuited. Held, error; that the defendant having failed to restore the street to such a state as not unnecessarily to impair its usefulness, it was for the jury to say whether its failure so to do did not occasion the accident; that the failure of the defendant to comply with the terms of a city ordinance prohibiting railroad companies from blowing off steam from their locomotives, so as to annoy teams or foot passengers, should also have been submitted to the jury, as tending to establish negligence. *Bell v. New York &c. R. R. Co.*, 29 Hun, 560 (1883). The defendants, who occupied, for business purposes, the second and upper floors of a building, were hoisting a box weighing about 500 pounds, to their rooms, by means of iron hooks attached to its sides. Just as it reached the second floor the hooks broke out of the wood, the box fell, breaking through the hatchway on the first floor, and it and its contents struck and injured the plaintiff, who was sitting in the basement. It was conceded that there was no contributory negligence on the part of the plaintiff, and that he was lawfully in the cellar. Held, the falling of the box raised a presumption of negligence on the

part of the defendants, which, in the absence of explanation, would justify the jury in finding in favor of the plaintiff. *Lyons v. Rosenthal*, 11 Hun, 46 (1877). Where, in an action against a railroad company to recover damages for an injury occasioned by a collision between the defendants' cars and the plaintiff's horse and wagon, there was evidence on both sides in regard to the negligence of the defendants, a verdict of a jury in favor of the plaintiff will be regarded as settling the question. *Sheffield v. Rochester &c. R. R. Co.*, 21 Barb. 339 (1856). Where, by defendant's neglect, as it was alleged, in conducting the repairs of a house, the plaintiff, while passing, was struck by a falling timber and injured, the true question to be put to the jury is, did the defendant take proper precautions to prevent the injury? *Vanderpool v. Husson*, 28 Barb. 196 (1858). Defendant had in his coalyard an elevator worked by steam, close to the line of the sidewalk, and, during the intermission of work, the sliding door by which it was commonly shut from the street was left open, and, in the absence of any person to guard it, a child who approached it was caught and crushed by the descending car. Held, question of defendant's negligence should be submitted to the jury. *Mullaney v. Spence*, 15 Abb. Pr. (N. S.) 319 (1874).

³⁰ *Crissey v. Hestonville &c. Ry. Co.*, 75 Pa. St. 83 (1874). Two boys, one twelve and the other five years of age—the elder

was injured by alighting from a railway car at night, at the wrong place and time, believing that he had reached his destination, and had been directed to leave the car, whereby he was injured. Held, that in every such case all the facts surround-

leading the younger by the hand — undertook to cross Second avenue, from west to east, near Twenty-eighth street, in the city of New York, in the day, about noon. A Second avenue street car was approaching them, at about ninety or a hundred feet south of them, upon an up grade. When they reached the westerly rail of the railroad, and after the elder boy had cleared the easterly track and the horses, the off horse struck the younger boy, who was a little behind, knocked him down, and the forward wheel of the car ran over him and severed his right arm, near the shoulder. On the trial, the testimony showed that the car, in which were but a few passengers, was driven with great rapidity, so much so that the witness would have been unable to get on or off it; that the driver stood on the front platform, leaning his shoulders against the car, with loose reins, which he was swinging up and down upon the horses, to urge them to greater speed, and that, with proper driving and care, the car could have been stopped within sixteen to twenty-two feet, and the collision avoided. Held, the judgment dismissing the complaint and the order denying a new trial be set aside, and a new trial ordered and the question of negligence submitted to the jury. *Pendrell v. Second Avenue R. R. Co.*, 43 How. Pr. 399 (1872); 2 *Jones & Sp.* 481. The deceased, mother

and daughter, passengers on a mail train of the defendant's cars, going west, left the cars at a station where they desired to stop, while the cars were on a slow move forward, getting off on the south side, where there was another railroad track, over seven feet distant. They attempted to cross the latter track, when an express train, going east at the rate of thirty or forty miles an hour, struck and killed them instantly. The two trains should have passed each other two and a half miles west of the station, the mail train being behind time. Held, question of negligence should be submitted to the jury. *Keller v. New York &c. R. R. Co.*, 24 How. Pr. 172 (1861). Compare *Ernst v. Hudson River R. R. Co.*, id. 97. In an action to recover damages for losses by injuries to the plaintiff, caused by the falling upon his house of a wall and oven which were in the course of erection by an adjoining owner on his own premises, by reason of negligence and carelessness in their construction, evidence was given tending to show that the wall had been cracking and settling for some days; that it was apprehended that such wall would not stand until finished; that they were pointed with mortar several times while being erected; that the arches cracked and the foundation was not good; that the building was not strong enough to bear the weight of the oven; that the

ing the circumstances under which he left the car should be looked to, and from them in each case, the jury must determine, as a question of fact, whether the passenger was authorized to believe from the acts and words of the servants of the company, that it was intended that he should alight from the car at the time and place he attempted to do so.³¹ The question whether

walls settled and that the building was anchored on one side only, when it ought to have been anchored on both. Held, the case should have been submitted to the jury. *Seabrook v. Hecker*, 2 Robt. 291 (1864). A municipal corporation, in preparing side drains to its streets, for carrying off rain water, is not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen. So, where the plaintiff sued for damages for flooding his cellar, caused by the gutters not being of sufficient capacity to carry off the water, and it appeared that they had for five years been sufficient and only failed on this occasion, it was error in the court below not to submit this view of the case to the jury. *Wright v. City of Wilmington* 92 No. Car. 156 (1885).

³¹ *Texas &c. Ry. Co. v. Garcia*, 52 Tex. 285 (1884). Plaintiff was employed by defendant to operate a turn-table by means of a crank that was stationary upon and revolved with the turn-table, and a track was laid in such proximity to the turn-table that, while an engine was on the turn-table, being turned by the plaintiff, it was struck by an engine passing upon the track, causing the crank to strike the plaintiff by a reverse motion, inflicting the injury complained of. Held, whether the defendant was guilty

of negligence in the construction and use of the track and turn-table was properly left to the jury. *Lake Shore &c. Ry. Co. v. Fitzpatrick*, 31 Ohio St. 479 (1877). The owners of a colliery conducted the blow-pipe from their boiler some distance underneath a narrow track, terminating in a wooden box open at one end, and buried under the track at a point about twenty inches below the surface. The constant action of the steam loosened the soil and caused a hole or excavation above the box. The track in question was the ordinary path of the miners in the employ of the colliery, in going to and returning from their work, but none of them knew of the existence of the blow-pipe. In an action by a miner against the owners of the colliery, for injuries sustained by him by falling into the hole in question, held, that the question of defendant's negligence was for the jury, and that it was error on the part of the court to decide it. *Payne v. Reese*, 100 Pa. St. 301 (1882). Plaintiff's intestate was found dead in the morning, in an excavation made by defendants along the sidewalk of a street. There was no direct evidence of how he came there. It was held, *Agnew, J.*, speaking for the court: "The natural instinct which leads men in their sober senses to avoid injury and preserve life is an element of evidence. In all

the negligence of the defendant's servant, the driver of a street car, which ran over and killed the plaintiff's intestate, a child

questions touching the conduct of men, motives, feeling and natural instincts are allowed to have their weight and to constitute evidence for the consideration of courts and juries. Adding these to the circumstances of this case, we cannot say that the evidence was insufficient to go to the jury as proof of actual neglect on the part of the defendants." *Allen v. Willard*, 57 Pa. St. 347, 380 (1868). The plaintiff was engaged as a laborer, under a stevedore employed by the shipowner, in unloading a vessel. The rope by which the load was raised was one that had been spliced by the mate before the arrival of the vessel at port, and was used as a "single fall," which was more liable to part than a "double fall." Whilst raising a cask, the rope parted at the splice, the cask fell and injured the plaintiff. Held, whether the stevedore was a fellow workman of the plaintiff, and whether the negligence of the mate in splicing the rope was a risk assumed by the plaintiff, were, under the circumstances, for the jury. *Mullan v. Philadelphia &c. Steamship Co.*, 78 Pa. St. 25 (1875). The engine of defendants, having given no notice of its approach, whistled under a bridge whilst a traveller was passing over it. His horses were frightened, ran off and injured him. Held, if danger might be reasonably apprehended it was the duty of the company to give some warning; the question was one for the jury. *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259 (1868). A man mounted a pile of

flagstones in a street to make a public speech. A crowd of hearers gathered about him, some of whom also got on the stones and broke them. Held, not a legal conclusion that the speaker was liable for the breaking of the stone by the bystanders. It was a question for the jury whether the defendant making the speech in the street was not, *per se*, a nuisance. *Fairbanks v. Kerr*, 70 Pa. St. 86 (1871). Whether the ringing of a locomotive bell, without blowing the whistle, is a sufficient warning of the approach of a train at a public road crossing, depends on the circumstances, of which, generally, in actions for negligence, it is for the jury to judge. The testimony of a witness who, being near the crossing, was expressly listening for train warnings and heard none, is of a higher grade than mere negative testimony, and, in connection with negative testimony of other witnesses, is sufficient to require the submission of the evidence to the jury. *Longenecker v. Pennsylvania R. R. Co.*, 105 Pa. St. 328 (1884). In an action against a railroad company to recover damages for the killing of the plaintiff's son, twelve years of age, by a train running into a wagon which he was driving, at a public road crossing, it appeared, from the plaintiff's evidence, that the locomotive's bell had been rung about half a mile from the crossing, and that the whistle was blown immediately before the collision occurred. Several witnesses, who were in the neighborhood of the crossing, testified

between four and five years old, and the question as to the negligence of the parent of the child in leaving it in charge of

that they heard no bell or whistle prior to the whistle which was immediately followed by the accident, and one witness testified that, being near the crossing with a skittish horse, he was listening for train warnings, but heard none. There was no evidence of contributory negligence by the deceased. The court entered a nonsuit, on the ground that there was no evidence of negligence by the defendant. Held to be error. The question should have been submitted to the jury. *Longenecker v. Pennsylvania R. R. Co.*, 105 Pa. St. 328 (1884). In an action against a street passenger railway company, to recover damages for an injury to a passenger, caused by a collision with another car of the defendant company while turning a curve, where it appeared that cars going in opposite directions, on a double-track road, could not pass round the curve without danger of coming into contact, and the testimony was conflicting as to whether plaintiff was sitting with his arm wholly within or partly outside the window, the questions of negligence and contributory negligence were properly submitted to the jury. *Germantown Passenger Ry. Co. v. Brophy*, 105 Pa. St. 38 (1884). A. was injured by an explosion of illuminating gas, which had found its way into his house through an untrapped drain leading from a sewer in a city. The gas had gotten into the sewer from a gas main whose end had been stopped by a wooden plug, which had rotted out. A patrolman and other witnesses testified

to having smelt the illuminating gas in the immediate neighborhood of A.'s house, a week or ten days before the explosion. Held, that this evidence should have been submitted to the jury, to determine whether the municipal officers, by the exercise of proper and reasonable diligence, could have discovered the defect in the gas main in time to have had it properly repaired before the explosion. *Kibele v. City of Philadelphia*, 105 Pa. St. 41 (1884). Held, in Pennsylvania, negligence was a question for the jury, where plaintiff's son, a lad about fourteen years old, was employed by the defendant in the carding and spinning-room, in the fourth story of a building, where the business of manufacturing woolen goods was carried on. He was working at one of the cards, and, while carrying an armful of waste from the carding machine to the wasteroom, fell through an open trapdoor or hatchway, a distance of sixty feet, to the bottom of the building, and was killed. There was no railing or protection around the hatchway, the trapdoors of which were ordinarily kept closed, on a level with the floor, except when it was in use. *Johnson v. Bruner*, 61 Pa. St. 58 (1869). D., seventeen years of age, and without mill experience, was employed by B., a roller boss, to serve him as a drag-down in a spikemill belonging to and operated by C. A portion of his duty was to reach over a set of revolving cogwheels and close a gate, that, if opened, allowed the metal, when it struck in the rolls,

its brother, thirteen years old, should have been submitted to the jury.³²

to pass on through. In one set of the train of ten rollers served by D., there was no guard or fender to prevent the person reaching over to close the gate, from being caught and dragged into the revolving cogs. On the fourth day of his employment, D., in reaching over to shut the gate, at the unprotected set of rollers, was drawn into the combination of cogs and terribly lacerated, and subsequently died from the effects of the injury. Held, in an action against C. for damages, that, as the gate closed, at times, with difficulty, and as D. was inexperienced and could only have had disclosed to him the peril he assumed in following the employment, by actual experience, the determination of his acquaintance with the risks he ran should have been submitted to a jury, and that, under the circumstances of the case, the court erred in directing a compulsory nonsuit and refusing to take it off. *Rummell v. Dilworth*, 111 Pa. St. 343 (1885); 131 id. 509. When a life is lost at a public crossing of a railroad, and the only evidence of the cause of the accident is the finding of a foot of the deceased in an opening or worn space at the side of the track, it is enough evidence to go to the jury as to whether it was occasioned by defendant's negligence. *Brown v. Pennsylvania R. Co.*, 15 Phila. 321 (1882).

³² *Dahl v. Milwaukee City Ry. Co.*, 62 Wis. 652 (1885). A., a workman in the employ of B., was injured by the breaking of an elevator chain, and the fall of the

elevator in B.'s machine shop. A.'s business was to load the elevator on the lower floor and unload it on the upper. A staircase near the elevator connected the two floors, and A. was injured while riding with his load on the elevator. It appearing that the chain had broken some six weeks before, and had been repaired, and the evidence being conflicting whether B.'s superintendent had been notified of the break, and it also appearing that the ratchets to arrest the fall of the elevator were not in working order, it was held, that the question of B.'s negligence was for the jury. *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204 (1883). In an action against a town treasurer brought by an administrator to recover for the killing of O., his intestate, at an excavation in a highway, the only evidence of the killing was that O. was seen walking along the highway in his usual manner, prior to the accident; held, the case should go to the jury to consider O.'s habits as to temperance and caution, and his acquaintance with the locality. *Cassidy v. Angell*, 12 R. I. 447 (1879). Upon a street railway a separate track was used for the cars going in each direction, and frogs were so placed as to prevent cars going in the proper direction from being thrown from the track while going upon or leaving a swing-bridge. A loaded wagon having broken down on the bridge on one of the tracks, a car, approaching thereon, was necessarily lifted to the other track, and being then

driven rapidly upon the bridge, was thrown from the track, injuring a passenger. Held, that the company was not negligent in not placing frogs so as to prevent a car thus *going in the wrong direction* upon the track from being thrown off; but that the question whether the speed with which the car was driven upon the bridge was not, under the circumstances, negligent, was for the jury. *White v. Milwaukee &c. Ry. Co.*, 61 Wis.

536 (1884). In a case where a vessel was loaded with iron ore, which was sold to a company which was to unload it when the vessel was brought alongside of the dock, which was done, the plaintiff, who was injured, was employed on the vessel, and had nothing to do with the unloading. It was held, that the negligence of the defendant was a question for the jury. *Cummings v. National Furnace Co.*, 60 Wis. 603 (1884).

PART III. DEFENSES — CONTRIBUTORY NEGLIGENCE — FELLOW SERVANTS.

CHAPTER XII.

DEFENSES — IN GENERAL.

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| <p>§ 295. Violation of law by plaintiff — Not a defense.</p> <p>296. Violation of law contributing to plaintiff's injury.</p> <p>297. Violation of law — Travelling on Sunday — Massachusetts rule.</p> <p>298. Travelling on Sunday — Massachusetts rule repudiated.</p> <p>299. Contracts limiting liability for negligence.</p> <p>300. In some States such contracts are legal.</p> <p>301. In some States the legality of such contracts is limited.</p> <p>302. Contracts waiving liability of masters — Statutes — Relief funds.</p> <p>303. Statute of Limitations — At common law — Torts — Statutes.</p> <p>304. The statute, when it begins to run.</p> <p>305. To toll the statute one disability cannot be tacked to another.</p> <p>306. The Statute of Limitations must be pleaded.</p> | <p>§ 307. The same subject continued — <i>Lex loci</i> — <i>Lex fori</i>.</p> <p>308. Who may plead the statute.</p> <p>309. Limitations in statutes giving a right of action for causing death.</p> <p>310. Such limitations differ from pure Statute of Limitations.</p> <p>311. Such limitations need not be specially pleaded.</p> <p>312. Releases for personal injuries.</p> <p>313. Releases by parents — Husband and wife.</p> <p>314. Release or payment for personal injury — Bar to suit for causing death.</p> <p>315. Release or payment for causing death.</p> <p>316. Releases — How impeached.</p> <p>317. Sealed and unsealed releases — Distinction.</p> <p>318. Payment — Judgment — Release of one joint tortfeasor releases all.</p> <p>319. Actions for causing death — Defenses — Civil and criminal action — Merger.</p> |
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§ 295. Violation of law by plaintiff — Not a defense. — As a general rule, "it is no defense to an action for negligence that the

plaintiff was engaged in violating the law in a given particular at the time of the happening of the accident, unless the violation of law was a proximate and efficient cause of the injury.”¹ Such cases usually arise where the plaintiff was injured while violating a statute or municipal ordinance; such as driving on the left-hand side of the street, in violation of law;² or trotting horses against each other for money, contrary to law;³ or driving at a rate of speed prohibited by a city ordinance;⁴ or that the plaintiff was not in a use of the highway justified by law;⁵ such as leaving horses standing in a street, in violation of a city ordinance;⁶ or that the plaintiff was purchasing and drinking a glass of beer on the Lord’s day, contrary to law.⁷ This is especially so, where the negligence of the defendant was willful.⁸

¹ Beach on Cont. Neg. (3d ed.), § 45; *Hamilton v. Goding*, 55 Me. 419 (1867); *Norris v. Litchfield*, 35 N. H. 271 (1857); *Manerly v. Union Ferry Co.*, 56 Hun, 113 (1890); *Klipper v. Coffey*, 44 Md. 117 (1875).

² *Spofford v. Harlow*, 3 Allen, 176 (1861).

³ *Welch v. Wesson*, 6 Gray, 505 (1856).

⁴ *Hall v. Ripley*, 119 Mass. 155 (1875); *Baker v. City of Portland*, 58 Me. 199 (1870); *Broschart v. Tuttle*, 59 Conn. 1 (1890).

⁵ *Bigelow v. Reed*, 51 Me. 325 (1863); *Mearow v. Uttech*, 46 Wis. 581 (1879). Such as driving at a reckless speed on a public street cannot be excused by showing an urgent necessity. *Eaton v. Crips*, 94 Iowa, 176 (1895).

⁶ *Steele v. Burkhardt*, 104 Mass. 59 (1870).

⁷ *Davidson v. City of Portland*, 69 Me. 116 (1879). The defendant cannot set up as a defense the unlawful act of the party injured. The result generally reached is

that “no man can set up a public or private wrong, committed by another, as an excuse for a willful or unnecessary, or even negligent injury to him or his property. This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases. It may be regarded as among those condensed maxims or statements of the common law which, by their simplicity and brevity, and, more than all, by their flexibility and almost universality, give to that system its wonderful adaptedness to the varying circumstances of particular cases as they arise, and the changing condition of society and its new combinations and discoveries.” *Kent, J.*, in *Hamilton v. Goding*, 55 Me. 419, 428 (1867). Nor is it a defense for the wrongdoer that others acted in the same way as he did. *Hill v. Winsor*, 118 Mass. 251 (1875).

⁸ *Welch v. Wesson*, 6 Gray, 505 (1856); *Steele v. Burkhardt*, 104 Mass. 59 (1870). Or wanton and

§ 296. Violation of law contributing to plaintiff's injury.—

If the unlawful act of the plaintiff contributed to cause the alleged injury, the plaintiff was not in the exercise of due care and cannot recover.⁹ Such unlawful act, if it directly contributed to the injury, is a conclusive bar to such recovery, and not merely evidence of contributory negligence.¹⁰ It has been held in Massachusetts, that if a person, while unlawfully travelling on Sunday, is injured by the assault of a dog, the act of travelling was not a contributory cause of the injury and the plaintiff could, notwithstanding his own violation of the law, maintain his action against the owner of the dog. The court said: "If a person, who is at the time acting in violation of law, receives an injury caused by the wrongful or negligent act of another, he may recover therefor if his own illegal act was merely a condition, and not a contributory cause of the injury. * * * It is true, that if he were not travelling he would not have received the injury, but the act of travelling is a condition, and not a contributory cause of the injury."¹¹ The fact that a natural cause contributes with an unlawful act of a person to inflict an injury, does not relieve him from liability to the person injured.¹² Nor is it a defense to the action against the defendant, that another was likewise guilty of wrong.¹³

§ 297. Violation of law — Travelling on Sunday — Massachusetts rule.— There is a class of cases which hold, that, if the plaintiff was violating the law when injured, he cannot recover for such injury,¹⁴ and that it is a good defense in some of the

malicious. *Wallace v. Merrimack* 599 (1880). See *Gregg v. Wyman, &c. Nav. Co.*, 134 Mass. 95 (1883). 4 Cush. 322 (1849).

If the defendant acted recklessly and wantonly, the illegal act of the plaintiff contributing to produce the injury is no defense. *Banks v. Highland Street Ry. Co.*, 136 Mass. 485 (1884). ¹² *Salisbury v. Herchenroder*, 106 Mass. 458 (1871); *Webster v. Rome &c. R. R. Co.*, 115 N. Y. 112 (1889). ¹³ *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700 (1882).

⁹ *Newcomb v. Boston Protective Department*, 146 Mass. 596 (1888). ¹⁴ *Thomas on Neg.* 1186; *Ray on Negligence of Imposed Duties*, § 149. Such as travelling on

¹⁰ *Ib.*; *Broschart v. Tuttle*, 59 Conn. 1 (1890). ¹¹ *Way v. Foster*, 1 Allen, 408 (1861); *Smith v. Boston &c. R. R.*

¹¹ *White v. Lang*, 128 Mass. 598, (1861); *Smith v. Boston &c. R. R.*

States, that the plaintiff was injured while travelling on Sunday, in violation of the statute which prohibits travelling on that day, except from necessity or charity. These decisions have been criticised, as being opposed to the general principles of justice and law.¹⁵ In Massachusetts this doctrine has been firmly established since the time of Chief Justice Shaw.¹⁶ It is said by Mr. Justice Gray that the illegal travelling of the plaintiff "necessarily contributes" to the injury.¹⁷ This has

Co., 120 Mass. 490 (1876); Bosworth v. Inhabitants of Swansey, 10 Metc. 363 (1845). Riding on a free pass issued to a different person and not transferable, not liable except for gross negligence. Toledo &c. Ry. Co. v. Beggs, 85 Ill. 80 (1877). Defrauding the conductor out of fare, company not liable for mere negligence. Toledo &c. Ry. Co. v. Brooks, 81 Ill. 245 (1876). Being on the engine by stealth, the company not liable. Chicago &c. R. R. Co. v. Michie, 83 Ill. 427 (1876). The maxim applies, "*In pari delicto, potior est conditio defendentis et possidentis.*" Wallace v. Cannon, 38 Ga. 199 (1868); Martin v. Wallace, 40 id. 52 (1869).

¹⁵ Philadelphia &c. R. R. Co. v. Philadelphia &c. Towboat Co., 23 How. (U. S.) 209, 218 (1859); Schmid v. Humphrey, 48 Iowa, 652 (1878); Sutton v. Town of Wauwatosa, 29 Wis. 21, 24 (1871); Baldwin v. Barney, 12 R. I. 392 (1879); Beach on Cont. Neg. (3d ed.), § 175; Whart. on Neg., § 331; Cooley on Torts, § 157.

¹⁶ Bosworth v. Inhabitants of Swansey, 10 Metc. 363 (1845); Jones v. Inhabitants of Andover, 10 Allen, 18 (1865). Applied to one riding upon a street car on the Lord's day. Stanton v. Metropolitan R. R. Co., 14 Allen, 485 (1867); Hamilton v. City of Boston, 14

Allen, 475 (1867); in which this doctrine is reviewed at some length by Mr. Justice Gray, applied to travelling on railway trains. Feital v. Middlesex R. R. Co., 109 Mass. 398 (1872); McGrath v. Merwin, 112 id. 467 (1873); Doyle v. Lynn &c. R. R. Co., 118 Mass. 195 (1875); Bucher v. Fitchburg R. R. Co., 131 id. 156 (1881); Day v. Highland Street Ry. Co., 135 id. 113 (1883); Smith v. Boston &c. R. R. Co., 120 id. 490 (1876).

¹⁷ Hall v. Corcoran, 107 Mass. 251, 253 (1871). For a summary of the cases which decide what is and what is not a travelling on Sunday from "necessity or charity," see Beach on Cont. Neg. (3d ed.), §§ 263-265; Baker v. City of Worcester, 139 Mass. 74 (1885). The statute of 1877 (chap. 232), enacting that the provisions of the Gen. Stats., chap. 84, § 2, "prohibiting travelling on the Lord's day, shall not constitute a defense to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling," does not apply to an action brought after it went into effect for an injury received before its enactment. Bucher v. Fitchburg R. R. Co., 131 Mass. 156 (1881); Read v. Boston &c. R. R. Co., 140 id. 199 (1885). See Stats. 1884, chap. 37.

been changed in Massachusetts by statute.¹⁸ This doctrine also prevails in Maine,¹⁹ and in Vermont.²⁰

§ 298. Travelling on Sunday — Massachusetts rule repudiated.

— This rule of the Supreme Court of Massachusetts, has been repudiated by the United States Supreme Court and by the courts of last resort in many of the States.²¹ It is not a defense

¹⁸ Stats. 1884, chap. 37, § 1. Bucher v. Cheshire R. R. Co., 125 "Chapter 98, Public Statutes, shall U. S. 555 (1888).
not constitute a defense to an action for a tort or injury suffered by a person on that day." Barker v. City of Worcester, 139 Mass. 74, 76, n. (1885); Jordan v. New York &c. R. R. Co., 165 id. 346 (1896).

¹⁹ Bryant v. Inhabitants of Biddeford, 39 Me. 193, 197 (1855); Hinckley v. Inhabitants of Penobscot, 42 Me. 89 (1856); Parker v. Latner, 60 id. 528 (1872); Cratty v. City of Bangor, 57 id. 423 (1869). The statute makes no distinction between those who travel in town and those who travel from town to town; nor between those who travel on foot and those who travel with horses and carriages.

²⁰ Johnson v. Town of Irasburgh, 47 Vt. 28 (1874); Holcomb v. Town of Danby, 51 id. 428 (1878). The Vermont cases are placed on different grounds from those in Massachusetts, viz., that the town was under no legal duty to furnish a safe highway to travel upon, when, at that precise time he was forbidden by law to travel over, and owing no duty to him they could not be held liable for neglect. *Ib.* See Boyden v. Fitchburg R. R. Co., 70 Vt. 125 (1897). Injury at railroad crossing.

²¹ Philadelphia &c. R. R. Co. v. Philadelphia &c. Towboat Co., 23 How. 209 (U. S. 1859); Powhatan Steamboat Co. v. Appomattox R. R. Co., 24 id. 247 (1860). See

Arkansas: Stewart v. Davis, 31 Ark. 518 (1876).

Connecticut: See Broschart v. Tuttle, 59 Conn. 1, 13 (1890); Horton v. Norwalk Tram. Co., 66 id. 272 (1895).

Idaho: Black v. City of Lewiston, 2 Idaho, 254 (1887).

Indiana: Yonoski v. State, 79 Ind. 393 (1881); Louisville &c. Ry. Co. v. Buck, 116 id. 566 (1888); Louisville &c. Ry. Co. v. Frawley, 110 id. 18 (1886).

Iowa: Schmid v. Humphrey, 48 Iowa, 652 (1872).

Kentucky: Commonwealth v. Louisville &c. R. R. Co., 80 Ky. 291 (1882); Illinois Central R. R. Co. v. Dick, 91 id. 434 (1891).

Maryland: Philadelphia &c. R. R. Co. v. Lehman, 56 Md. 409 (1881).

Michigan: Sharp v. Evergreen Township, 67 Mich. 443 (1887).

Minnesota: Opsahl v. Judd, 30 Minn. 126 (1883).

Mississippi: See Merchants Wharf Boat Assn. v. Wood, 64 Miss. 661 (1887).

New Hampshire: Dutton v. Weare, 17 N. H. 34 (1845); Corey v. Bath, 35 id. 530 (1857).

New Jersey: Smith v. New York &c. R. R. Co., 17 Vr. 7 (1884); Delaware &c. R. R. Co. v. Trautwein, 23 id. 169 (1889).

New York: Carroll v. Staten Island R. R. Co., 58 N. Y. 126

for an injury done to a passenger of a common carrier, that the wrong was done on Sunday. The cases are based upon the principle, that it is a public duty, imposed by law upon carriers of passengers to carry safely, so far as human skill and foresight can go. This duty exists independently of contract. It is imposed whether there is a contract to carry, or the service rendered is gratuitous. The liability is the same whether the action is brought upon contract, or for a failure to perform the duty imposed by law.²² So it is not a defense to an action by a servant against his employer, that the injury was done on Sunday, although it is illegal to labor on Sunday.²³

§ 299. **Contracts limiting liability for negligence.**—It is said the general rule is, that, a common carrier cannot, by contract, exempt itself from liability to a passenger, for injuries and damages caused by negligence. The public has an interest in the contract, which a private individual cannot waive,²⁴ although there are conflicting decisions by the courts on this point. A contract by a passenger with a common carrier, limiting the liability for negligence, is not a defense where death ensues and the action is brought by the widow and child of the deceased.²⁵ A common carrier cannot lawfully stipulate

(1874); *Platz v. City of Cohoes*, 89 Judd, 30 Minn. 126 (1883); *Merritt id.* 219 (1882). See *Merritt v. v. Earle*, 29 N. Y. 115 (1864). See *Earle*, 29 *id.* 115 (1864); *Shelton v. § 28; Merchants Wharf Boat Assn. Merchants &c. Co.*, 59 *id.* 258 v. Wood, 64 Miss. 661 (1887). (1874).

Ohio: *McGatrick v. Wason*, 4 Ohio St. 566 (1855).

Pennsylvania: *Mohney v. Cook*, 26 Pa. St. 342 (1855); *Piollet v. Simmers*, 106 *id.* 95 (1884).

Rhode Island: *Baldwin v. Barney*, 12 R. I. 392 (1879).

Wisconsin: *Sutton v. Town of Wauwatosa*, 29 Wis. 21 (1871); *McArthur v. Green Bay &c. Canal Co.*, 34 *id.* 139 (1874); *Knowlton v. Milwaukee City Ry. Co.*, 59 *id.* 278 (1884); *Beach on Cont. Neg.* (3d ed.), §§ 261-267.

²² *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126 (1874); *Opsahl v.*

²³ *Johnson v. Missouri Pacific Ry. Co.*, 18 Neb. 690 (1886); *Louisville &c. Ry. Co. v. Frawley*, 110 Ind. 18 (1886); *Louisville &c. Ry. Co. v. Buck*, 116 Ind. 566 (1888); *Houston &c. Ry. Co. v. Rider*, 62 Tex. 267 (1884). See *Thomas on Neg.* 1191 *et seq.*

²⁴ *Ray on Negligence of Imposed Duties*, chap. 14, § 79, in which will be found a discussion of this subject with a citation of many cases. *Bird v. Southern Ry. Co.*, 99 Tenn. 719, 727 (1897); *Illinois Central R. R. Co. v. Beebe*, 174 Ill. 13 (1898).

²⁵ *Adams v. Northern Pacific Ry.*

for exemption from responsibility when such exemption is not just or reasonable in the eye of the law. It is not just or reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility, for the negligence of himself or his servants.²⁶

§ 300. In some States such contracts are legal.— In England and in some of the State courts, it has been held, that common carriers of passengers may restrict their common-law liabilities by special contract, so as to relieve themselves from the consequences of all negligence, on the part of their servants or employes. That such contracts are not void as being against public policy. In such States such contracts will constitute a legal defense, to actions brought to recover damages for personal injuries to the passenger, caused by the negligence of the common carrier.²⁷

§ 301. In some States the legality of such contracts is limited.— The United States Supreme Court and many of the State courts have held, that, while common carriers may restrict their

Co., 95 Fed. Rep. 938 (1899), under the Washington and Idaho statutes.

²⁶ Railroad Co. v. Lockwood, 17 Wall. 357 (1873). The liability for damages for personal injuries, caused by the negligence of the employes of a railroad company, is a legitimate subject of agreement between the parties to a contract, by two railroad companies, for the operation of the railroad, when they deal with each other on equal terms, such a contract is not void as against public policy. South Carolina &c. R. R. Co. v. Carolina &c. Ry. Co., 93 Fed. Rep. 543 (1899).

²⁷ Bailey on Master's Liability for Injuries to Servants, pp. 475-481.

England: Free pass "at his own risk." McCauley v. Furness Ry. Co., L. R., 8 Q. B. 57 (1872); Hall

v. Northeastern Ry. Co., L. R., 10 id. 437 (1875).

Connecticut: Griswold v. New York &c. R. R. Co., 53 Conn. 371, 386 (1885), in which the cases are collected and reviewed, applied to the case of a free passenger.

New Jersey: Kinney v. Central R. R. Co., 4 Vr. 407 (1868); affirmed, 5 id. 513 (1869).

New York: Wells v. New York Central R. R. Co., 26 Barb. 641 (1858); 24 N. Y. 181 (1862); Perkins v. New York Central R. R. Co., 24 id. 196 (1862); Smith v. New York Central R. R. Co., 24 id. 222 (1862); Bissell v. New York Central R. R. Co., 25 id. 442 (1862); Magnin v. Dinsmore, 56 id. 168 (1874).

West Virginia: Baltimore &c. R. R. Co. v. Skeels, 3 W. Va. 556 (1869).

Wisconsin: See Annas v. Milwaukee &c. R. R. Co., 67 Wis. 46, 59 (1886).

common-law liabilities by special contract, there is a limit to the extent to which such contracts will be valid.²⁸ It was held by the New York Court of Appeals, that a railroad company cannot, by contract, exempt itself from liability, to a passenger for damage, resulting from its own willful misconduct or recklessness which is equivalent thereto. But in respect to a gratuitous passenger, it may contract for exemption from liability, for any degree of negligence in its servants, other than the board of directors or managers, who represent the company itself, for all general purposes.²⁹

§ 302. Contracts waiving liability of masters — Statutes — Relief funds.— In some of the States statutes have been enacted, which declare that no contract restricting the liability of railroad companies to their servants, for injuries caused by the

28 United States: Railroad Co. v. Lockwood, 17 Wall. 357 (1873); Railroad Co. v. Stevens, 95 U. S. 655 (1877); Philadelphia &c. R. R. Co. v. Derby, 14 How. 468 (1852); Waterbury v. New York &c. R. R. Co., 17 Fed. Rep. 671 (1883). Minnesota: Jacobus v. St. Paul &c. Ry. Co., 20 Minn. 125 (1873). Ohio: Lake Shore &c. Ry. Co. v. Spangler, 44 Ohio St. 471 (1886). Pennsylvania: Pennsylvania R. Co. v. Butler, 57 Pa. St. 335 (1868).

Alabama: Mobile &c. R. R. Co. v. Hopkins, 41 Ala. 486 (1868). Tennessee: Memphis &c. R. R. Co. v. Jones, 2 Head, 517 (1859);

Georgia: Such a contract is legal, if it does not waive *criminal* neglect. Western &c. R. R. Co. v. Bird v. Southern Ry. Co., 99 Tenn. 719, 727 (1897).

Texas: International &c. Ry. Co. v. Henzie, 82 Tex. 623 (1891); Gulf &c. R. R. Co. v. McGown, 65 id. 640 (1886).

Illinois: Illinois Central R. R. Co. v. Morrison, 19 Ill. 136 (1857); &c. R. R. Co., 86 Va. 975 (1890).

Illinois Central R. R. Co. v. Read, 37 id. 484 (1865); Illinois Central R. R. Co. v. Beebe, 174 id. 13 (1898). Wisconsin: Annas v. Milwaukee &c. R. R. Co., 67 Wis. 46, 59 (1886). Such contracts are void. Davis v. Chicago &c. Ry. Co., 93 Wis. 470 (1896).

Indiana: Ohio &c. R. R. Co. v. Selby, 47 Ind. 471 (1874). 29 Perkins v. New York Central R. R. Co., 24 N. Y. 196 (1862). See Blair v. Erie Ry. Co., 66 id. 313 (1876). On this subject it may be pertinent to repeat what Chief Justice Beasley said in reference to another subject, viz., that the law is still in a fluent condition,

Maine: Willis v. Grand Trunk Ry. Co., 62 Me. 488 (1873).

Maryland: State v. Western &c. R. R. Co., 63 Md. 433 (1884).

Massachusetts: Commonwealth v. Vermont &c. R. R. Co., 108 Mass. 7 (1871).

negligence of a fellow servant, shall be legal and binding.³⁰ It is against public policy to allow the provisions of a statute, touching the care an employer must exercise, with regard to the protection of his employes from personal injury, to be dispensed with by contract;³¹ or as stated in an Alabama case, a railroad company cannot stipulate for immunity from liability, for its own wrongful negligence, nor require an employe to assume the risks, which, by statute are devolved on itself.³² In the New York Court of Appeals it was questioned, if a consideration was given, whether in such a case the contract would be valid. The court said it may be void on grounds of public policy, for railroad and other corporations to exact such a contract.³³ A contract by an employe of a railroad company,

and that the last word, in reference to it, has not yet been spoken. For a comprehensive discussion of this point the reader is referred to Judge Ray's book, *Negligence of Imposed Duties*, chap. 14, § 79. See also *Shearm. & Redf. on Neg.* (5th ed.), § 505; *Beach on Cont. Neg.* (3d ed.), § 168 *et seq.*

³⁰ Iowa: Code, § 1307.

Florida: Chap. 4071, *Laws of 1891*, § 3.

Kansas: Chap. 93, *Laws of 1874*; *Kansas Pacific Ry. Co. v. Peavey*, 29 Kan. 169 (1883).

Minnesota: Chap. 13, *Laws of 1887*.

Mississippi: Code 1892, § 3559.

Texas: *Laws of 1891*, chap. 24, § 3.

Virginia: Code, § 1296.

Wisconsin: Chap. 220, *Laws of 1893*.

Wyoming: *Laws of 1890-91*, chap. 28.

³¹ *Chicago &c. Coal Co. v. Peterson*, 39 Ill. App. 114 (1890); *Lake Shore &c. Ry. Co. v. Spangler*, 44 Ohio St. 471 (1886). "Such liability is not created for the protection of the employes simply, but has its reason and foundation in public

necessity and policy which should not be asked to yield or surrender to mere private interests and agreements." *Ib.*

³² *Louisville &c. R. R. Co. v. Orr*, 91 Ala. 548 (1890). In the same case it was held, that a stipulation in a contract of employment for service on a railroad, that the compensation paid "shall cover all risks incurred, and liability to accident from any cause whatever, and if an employe is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized," was void. Such a stipulation was in contravention of the statutory provision (Code, § 2590), it was opposed to public policy and did not secure the railroad company, exemption from statutory liability. *Hissong v. Richmond &c. R. R. Co.*, 91 Ala. 514 (1890). This is so independently of the Code, § 1296. *Johnson v. Richmond &c. R. R. Co.*, 86 Va. 975 (1890). See *Cooley on Torts*, p. 687; 2 *Thomp. on Neg.* 1025.

³³ *Purdy v. Rome &c. R. R. Co.*, 125 N. Y. 209 (1891). That case was decided on the ground that there was no consideration for the

signing a written recognition of a rule made by the company for coupling cars, and waiving all liability of the company to him, for any result of disobedience thereof, is valid. It was not a contract by the company exempting itself from liability, for its own negligence.³⁴ A parent at the time of hiring, may release an employer from damages, which *he* is entitled to recover, by reason of injuries to his child, caused by negligence;³⁵ a servant cannot release the master from liability, for damages from an injury caused by the latter's negligence, so as to preclude a recovery for the servant's death, by the widow and next of kin.³⁶ In New Jersey the Court of Errors and Appeals held, that a contract whereby an employe became a member of an association, thereby entitling him to participate in the proceeds of a relief fund, established by the master, and agreeing to release the employer from damages for injuries, received while in the service of the employer, is a valid and a good defense, in an action brought by the employe against the employer to recover damages.³⁷

§ 303. Statute of Limitations — At common law — Torts — Statutes.—Limitation of actions means the time at the end of

contract. In Georgia it is held, that such contracts may be binding except for criminal negligence. *Fulton Bag &c. Mills v. Wilson*, 89 Ga. 318 (1892); *Western &c. R. R. Co. v. Bishop*, 50 id. 465 (1873); *Galloway v. Western &c. R. R. Co.*, 57 id. 512 (1875); *Cook v. Western &c. R. R. Co.*, 72 id. 48 (1883). See 24 Alb. L. J. 383; *Griffiths v. Earl of Dudley*, L. R., 9 Q. R. D. 357 (1882).

³⁴ *Russell v. Richmond &c. R. R. Co.*, 47 Fed. Rep. 204 (1891). See *Thomp. on Neg.* (vol. 2), p. 1025; 1 Cent. L. J. 465.

³⁵ *International &c. Ry. Co. v. Hinzie*, 82 Tex. 623 (1891). But such release does not affect the right to damages by the minor. *Ib.* An employe continuing to work in a factory knowing that

the provisions of the statute have not been complied with, which by the statute is made criminal, does not thereby waive such provisions of the statute, nor does he assume the risks incident to the use of machinery, without the required statutory safeguards. *Simpson v. New York Rubber Co.*, 80 Hun, 415 (1894).

³⁶ *Maney v. Chicago &c. R. R. Co.*, 49 Ill. App. 105 (1892). Case of insurance in a "relief department." *Contra*, *Griffiths v. Earl of Dudley*, L. R., 9 Q. B. D. 357 (1882).

³⁷ *Beck v. Pennsylvania R. R. Co.*, Vr. ; 43 Atl. Rep. 908 (1899). The cases on this point will be found cited in the opinion of the court in that case. See *Maney v. Chicago &c. R. R. Co.*, 49 Ill. App. 105 (1892).

which, no action at law or suit in equity, can be maintained.³⁸ The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes.³⁹ As to torts at common law, the maxim *actio personalis moritur cum persona* was applied;⁴⁰ the death absolutely extinguished the right; the right of action was limited by the duration of the life of either party. The time within which an action may be brought to recover damages for an injury to the person in the several States, varies from one year to six years. In some States it is one year,⁴¹ two years,⁴² three years,⁴³ four years,⁴⁴ five years,⁴⁵ six years.⁴⁶ In Massachusetts actions against em-

³⁸ Angell on Limitations, § 1. They are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced. Wood on Limitations (2d ed.), § 1.

³⁹ United States v. Thompson, 98 U. S. 486, 489 (1878).

⁴⁰ Nonce v. Richmond &c. R. R. Co., 33 Fed. Rep. 429, 431 (1887). See Angell on Limitations; Wood on Limitations; Stimson's American Statute Law.

⁴¹ Alabama, Code of Ala., § 2619; Arizona, Rev. Stats. 1887, § 2309; Kentucky, Ky. Stats. 1894, § 2516; Missouri, Rev. Stats. of Mo. 1889, § 4429; Tennessee, Code of Tenn. 1896, § 4469; Texas, Rev. Stats. of Tex. 1895, p. 649, § 3353.

⁴² Illinois, Starr & C. Ann. Stats. 1896, p. 2624, par. 14; Indiana, Stats. 1896, § 293; Iowa, Code of Iowa 1888, § 3734, par. 1; Kansas, Gen. Stats. 1889, § 4095; New Hampshire, Pub. Stats. 1891, p. 598, § 3; Oklahoma, Stats. of Okla. 1893, § 18, par. 3890; Oregon, Hill's Ann. Laws 1892, § 8.

⁴³ Delaware, Rev. Code 1893, p. 888, § 6; Maryland, Pub. Gen. Laws (vol. 2), p. 942, § 1; New York, Code of Civ. Pro., § 383;

Dickinson v. Mayor &c. of New York, 92 N. Y. 584 (1883); Maxson v. Delaware &c. R. R. Co., 112 id. 559 (1889); Watson v. Forty-second Street &c. R. R. Co., 93 id. 522 (1883); Webber v. Herkimer &c. R. R. Co., 109 id. 311 (1888); North Carolina, Code of No. Car. 1883, § 155, par. 5; Washington, Code 1896, § 4065.

⁴⁴ Nebraska Comp. Stats. 1895, § 5602; Nevada Gen. Stats. 1885, § 3648; Ohio, Bate's Ann. Stats. 1897, § 4982; Utah, Comp. Laws 1888, § 3150; Wyoming, Rev. Stats. 1887, § 2371.

⁴⁵ Arkansas, Dig. of Stats. 1894, § 4832; Montana, Const. & Stats. 1895, p. 786, § 518; Virginia, Code of Va. 1887, § 2927.

⁴⁶ Colorado, Mill's Ann. Stats. 1891, chap. 78, § 2900; Connecticut, Gen. Stats. 1888, § 1375; Massachusetts, Pub. Stats., p. 1115, § 1; Michigan, Gen. Stats. 1882, § 8713, par. 7; Minnesota, Stats. of Minn. 1894, § 5136. See Brown v. Village of Heron Lake, 67 Minn. 146 (1897); Mississippi, Code, § 2737; New Jersey, Gen. Stats. (vol. 2), p. 1974, § 8; North Dakota, Rev. Codes 1895, § 5201, par. 5; Pennsylvania, Brightly's Purd. Dig. 1894, p. 1213, § 19; Rhode Island, Gen. Laws 1896, p. 810, § 3; South Caro-

ployers by employes and actions for injuries against street railway companies causing death, must be brought within one year.⁴⁷ In Montana actions against a municipal corporation for damages for an injury, must be brought within one year.⁴⁸ In New Jersey actions for injuries to persons, against railroad companies, must be brought within two years.⁴⁹

§ 304. *The statute, when it begins to run.*—The Statute of Limitations begins to run from the moment of the injury, and it is not suspended by the lapse of time between the death of the person injured and the qualification of the personal representative.⁵⁰ The statute makes no distinction between the cases, where the injured party lives a time, and where death is instantaneous.⁵¹ One who has received an injury during minority may sue by *prochein ami* at any time during his infancy; or he may decline doing so, and bring his suit within one year after attaining his majority.⁵²

lina, Code of Civ. Pro., chap. 3, § 112; Vermont, Vt. Stats. 1894, § 1199; Wisconsin, San. & Berr. 1 Baxt. 312 (1872).

Ann. Stats., p. 2173, § 4222. For a list of the Statutes of Limitations of the several States, see Wood on Limitations (2d ed.), § 749.

⁴⁷ Supp. Pub. Stats. of Mass. 1882–1888; Act May 6, 1892, § 400.

⁴⁸ Montana, Const. Codes & Stats. 1895, p. 786, § 516.

⁴⁹ Gen. Stats. N. J. (vol. 2), p. 2686, § 203. It does not apply to horse railroads. North Hudson County Ry. Co. v. Flanagan, 28 Vr. 236 (1894); id. 696. A receiver of a railroad may set up as a defense such statute. Bartlett v. Keim, 21 Vr. 260 (1888).

⁵⁰ Fowlkes v. Nashville &c. R. R. Co., 9 Heisk. 829 (1872); Wood on Limitations (2d ed.), § 179. See Hayes v. Williams, 17 Colo. 465 (1892); Rugland v. Anderson, 30 Minn. 386 (1886).

⁵¹ Fowlkes v. Nashville &c. R. R. Co., 9 Heisk. 829 (1872); 5 Baxt. 663 (1875). The minority of infant

plaintiffs cannot take the case out of the statute. Bledsoe v. Stokes,

⁵² Whirley v. Whiteman, 1 Head, 610, 616 (1858). His delay for a period of eighteen years to bring suit, though a matter, if not accounted for, is proper to be taken into consideration by the jury in estimating the damages, it can have no influence upon the question, as to his right to maintain the action. *Ib.* So under Rev. Stats. Mo. 1879, §§ 2121, 2125; Rutter v. Missouri &c. Ry. Co., 81 Mo. 169 (1883). So of an infant or lunatic under the New Jersey statute. Smith v. Felter, 32 Vr. 102 (1897). When a minor is injured by the negligence of another and the injury is of a permanent nature necessarily affecting him for life, such minor can, after attaining his majority, maintain an action for damages for such injury, notwithstanding any right of action which such minor's father might have had, prior to the minor's majority. Camp v. Hall, 39 Fla. 535 (1897).

§ 305. To toll the statute one disability cannot be tacked to another.— To toll the statute, a disability must have existed when the cause of action accrued — one disability cannot be tacked to another — *i. e.*, after the statute is under way, no subsequent accruing disability can, in any way, affect it.⁵³ Most, if not all, of the States provide, that the statute shall be suspended for disabilities, such as infancy, coverture, insanity, imprisonment, or absence from the State.

§ 306. The Statute of Limitations must be pleaded.— The Statute of Limitations must be specially pleaded.⁵⁴ It is a personal privilege. The better mode of pleading the Statute of Limitations in actions for personal injuries is *actio non accrevit infra sex annos*, *i. e.*, the action did not accrue within six years, and not simply “not guilty” within six years, because in actions upon tort the action may be for the consequences of the act originating the tort. The latter plea has been held bad on special demurrer.⁵⁵

§ 307. The same subject continued — *Lex loci* — *Lex fori*.— “Suit may be brought upon causes of action arising under the common law wherever service can be obtained; it is difficult to understand how a Statute of Limitation of one State, even though it extinguishes a cause of action after the lapse of a certain period, can have any extra-territorial effect unless both parties to be affected by the statute reside within the State where the law prevails, for the full statutory period.”⁵⁶ The act complained of must be a tort at common law or by statute

⁵³ 13 Am. & Eng. Ency. of Law County v. Waterman, 26 Conn. (1st ed.), 732; Wood on Limitations 324 (1857).

⁵⁴ 2d ed.), § 6. Thus, if a man dies, even a day after his cause of action accrues, and leaves infant heirs, their disability does not avail them, though it continue until the bar of the statute fails. See Sherman v. Western Stage Co., 24 Iowa, 515 (1868).

⁵⁵ Wood on Limitations (2d ed.), § 7; Chiles v. Drake, 2 Metc. 146 (1859, Ky.). Unless the petition shows that the action is barred by time. *Ib.*; Bank of Hartford

⁵⁶ Angell on Limitations, chap. 27, § 12; Wood on Limitations (2d ed.), § 7; Dyster v. Battye, 3 B. & Ald. 448 (1820); Fisher v. Pond, 1 Hill, 672 (N. Y. 1841); Gathright v. Wheat, 70 Tex. 740 (1880); Manning v. Dallas, 73 Cal. 420 (1887).

⁵⁶ Thayer, J., Finnell v. Southern Kans. Ry. Co., 33 Fed. Rep. 427 (1887). The plaintiff sustained personal injuries in Kansas, and immediately went to Missouri, of which State he was a resi-

in the place where committed, for the merits of the cause of action are determined by the laws of the place where it arose. But the mode of procedure and remedy, including Statutes of Limitations, are solely regulated by the laws of the place where the action is brought,⁵⁷ unless otherwise specially provided by statute.⁵⁸

§ 308. **Who may plead the statute.**—In New York it has been held, that a foreign corporation sued in New York cannot avail itself of the Statute of Limitations.⁵⁹ This ruling of the New York courts has been condemned, especially by the United States Supreme Court.⁶⁰ Nonresidents can plead the statute in Maryland.⁶¹ In New Jersey it was held, that a receiver of a railroad company has the right to set up as a defense, against a suit for injuries sustained from negligence, in running the trains by such receiver, the statute of that State, which requires suits for such negligence to be brought against railroad companies within two years.⁶²

dent, and there resided until the trial, and did not bring action until more than two years had elapsed, as provided in the Kansas statutes. Gen. Stats. of Kan. 1868, chap. 80, art. 3, § 18. Held, that the statute of Kansas would not bar an action given by the common law, unless both parties resided in that State during the full period of limitation.

⁵⁷ *Nonce v. Richmond &c. R. R. Co.*, 33 Fed. Rep. 429, 435 (1887); *Medluny v. Hopkins*, 3 Conn. 472 (1820); *Blackburn v. Morton*, 18 Ark. 384 (1857); *Krogg v. Atlanta &c. R. R. Co.*, 77 Ga. 202 (1886). In respect to remedies, the rule is, that the limitation prescribed by the *lex fori* must prevail in all cases of personal actions. Angell on Limitations, chap. 8, § 3. In some of the States, it is provided by statute, that if, by the laws of the State where the cause of action arose, the action is barred, it is also barred in that State. *Bates' Ann. Ohio Stats.* 1897, § 4990.

⁵⁸ *Horton v. Horner*, 14 Ohio, 437, 444 (1846); *Thompson v. Berry*, 26 Tex. 263 (1862).

⁵⁹ *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210 (1859); *Boardman v. Lake Shore &c. R. R. Co.*, 84 id. 157, 185 (1881); *Rathbun v. Northern Central R. R. Co.*, 50 id. 656 (1872); *Thompson v. Tioga R. R. Co.*, 36 Barb. 79 (1861); *Kirby v. Lake Shore &c. R. R. Co.*, 14 Fed. Rep. 261 (1882). Otherwise as to domestic corporations. *Kane v. Bloodgood*, 7 Johns. Ch. 90, 129 (1823).

⁶⁰ *Tioga R. R. Co. v. Blossburg &c. R. R. Co.*, 20 Wall. 137 (1873).

⁶¹ *Bannon v. Lloyd*, 64 Md. 48 (1885). In California, a foreign corporation acting as a common carrier doing business and operating a railroad in order to avail itself of a plea of the Statute of Limitations, must comply with Act of 1872. *Pierce v. Southern Pacific Co.*, 120 Cal. 156 (1898).

⁶² *Bartlett v. Keim*, 21 Vr. 260 (1888).

§ 309. **Limitations in statutes giving a right of action for causing death.**— The statutes which create a right of action for causing the death of a human being by negligence or default of another, usually contains a provision limiting the time within which such action may be brought. Thus Lord Campbell's Act provides that "every such action shall be commenced within twelve calendar months after the death of such deceased person."⁶³

639 & 10 Vict., chap. 93, § 3. New Brunswick, Cons. Stats., chap. 86, § 5. Maryland, Pub. Gen. Laws, art. 67, § 2; New Jersey, Rev. 1878, p. 294, § 2. Nova Scotia, "within twelve months after death." Rev. Stats. 1884, chap. 116, § 3. Ontario, "within twelve months after death." Rev. Stats. 1887, chap. 135, § 5. "Within twelve months after death." Virginia, Code 1887, § 2903. Arizona, "within one year after cause of action shall have accrued." Rev. Stats. 1887, § 2309. "The cause of action shall be considered as having accrued at the death of the party injured." Rev. Stats. 1887, § 4. Texas, Sayles' Civil Stats., art. 3202. New Mexico, Comp. Laws 1884, as amended by Laws of 1891, chap. 49, § 2316. District of Columbia, "within one year after the death." Act of Cong., Feb. 17, 1885, § 2. Louisiana, Civil Code, art. 2315, as amended by art. 71, 1884, p. 94, "for the space of one year from the death." Maine, indictment "within one year." Rev. Stats. 1883, chap. 51, § 68, chap. 52, § 7. Mississippi, "within one year after the death." Code 1892, § 663. North Carolina, Code 1883, § 1498. Pennsylvania, 2 Brightley's Purd. Dig., pp. 1267, 1268, § 5. Connecticut, "within one year after the neglect complained of." Gen. Stats. 1888, § 1009. In a suit against a railroad company

"within eighteen months from and after the death of such person." Gen. Stats. 1888, § 1383. Massachusetts, "within one year from the injury causing the death." Pub. Stats. 1886, chap. 140. "Within one year from the occurrence of the accident causing the injury or death." Stats. 1887, chap. 270, as amended by Stats. 1888, chap. 155, and Stats. 1892, chap. 260, § 3. Missouri, "within one year after the cause of such action shall accrue." Rev. Stats. 1889, § 4429. Ontario, "Within a year after death." Civil Code L. Can., art. 1056. Alabama, "within two years from and after the death." Code 1887, § 2589. Arkansas, "within two years after the death." Mansf. Dig., § 5226. Oregon, Hill's Code, § 371. Utah, Comp. Laws 1888, § 2962. Washington, Hill's Ann. Stats & Code 1891, § 703. California, "within two years." Code Civ. Pro., § 339. Idaho, Rev. Stats. 1887, § 4055. Indiana, Rev. Stats. 1881, § 284. Iowa, McClain's Ann. Code, § 3734. Kansas, Gen. Stats. 1889, par. 4518. Oklahoma, Stats. 1890, chap. 70, art. 4, par. 4338. Wisconsin, Rev. Stats. 1878, § 4224. Colorado, "within two years from the commission of the alleged negligence resulting in the death for which suit is brought." Gen. Stats. 1883, § 1033. Florida, "No action * * * shall be brought after

In those States where the statute provides that the action must be brought within a certain period "after the death" no question can arise as to the time when the statute begins to run.⁶⁴ The Arizona statute provides that the cause of action shall be considered as having accrued at the death of the party injured.⁶⁵ Under the act of 1853 (Rev. of 1866, p. 202), Connecticut, the action is limited to be "commenced within one year after the cause of action shall have arisen." It was held, that the statute commenced to run from the appointment of an administrator.⁶⁶ Some of the statutes provide, that the action must be

the expiration of two years from the date of the death of the party from whose death such action shall accrue." Laws 1883, chap. 3439, No. 27, § 53. Illinois, "within two years after the death of such person." 1 Starr & C. Ann. Stats., chap. 70, § 2. Maine, Acts 1891, chap. 124. Nebraska, Comp. Laws 1881, chap. 21, § 2. Minnesota, "shall be commenced within two years after the act or omission by which the death was caused." Laws 1891, chap. 123, § 1. New Hampshire, "within two years after the death of the deceased party." Pub. Stats. 1891, chap. 191, § 10. New York, "within two years after the decedent's death." Banks' Ed. Ann. Code Civil Pro. 1888, § 1902. Ohio, Rev. Stats., as amended by Act April 13, 1880, § 6135. South Carolina, "within two years from the death of such person." Gen. Stats. 1882, § 2185; Vermont, "within two years from the decease of such person." Rev. Laws 1880, § 2139. West Virginia, "within two years after the death of such deceased person." Code chap. 103, § 6. Wyoming, Rev. Stats. 1887, § 2364b. Montana, "within three years after the death of such person." Comp. Stats. 1888, p. 911, § 982. In the

States of Delaware, Georgia, Kentucky, Michigan, Nevada, North Dakota, Rhode Island, South Dakota and Tennessee there is no prescribed time, in the statute within which the action must be brought, but such time is governed by the general Statute of Limitations in those States. Delaware, three years. Rev. Code 1893, p. 888, § 6. Kentucky, one year. Ky. Stats. 1894, § 2516. Tennessee, Code 1896, § 4469. Nevada, four years. Gen. Stats. 1885, § 3648. Michigan, six years. Gen. Stats. 1882, § 8713, par. 7. North Dakota, Rev. Codes 1895, § 5201, par. 5. Rhode Island, Gen. Laws 1896, p. 810, § 3.

⁶⁴ See *Kennedy v. Burrier*, 36 Mo. 128 (1865); *Hanna v. Jeffersonville R. R. Co.*, 32 Ind. 113 (1869); *Louisville & c. R. R. Co. v. Sanders*, 86 Ky. 259 (1887); *Chiles v. Drake*, 2 Metc. 146 (Ky. 1859).

⁶⁵ Rev. Stats. 1887, § 2309, par. 4.

⁶⁶ *Andrews v. Hartford & c. R. R. Co.*, 34 Conn. 57 (1867). So, in Iowa, it was held, that where a cause of action accrues to the estate of a decedent instead of the deceased, while living, the Statute of Limitations will not commence to run until the appointment of an administrator. *Sherman v. West-*

brought within a certain time after the action accrues;⁶⁷ or from the injury.⁶⁸ What is a commencement of a suit in this class of cases will depend upon the statutes and decisions of the several jurisdictions applicable to other cases.⁶⁹ In Kentucky,⁷⁰ and Texas⁷¹ the statute makes the ordinary disability available in this class of actions. Where a right of action for a tort is given by a statute of another State, and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that State, the *lex fori*, and not the *lex loci*, applies on the subject of limitation.⁷²

§ 310. Such limitations differ from pure Statute of Limitations.

— Where time is of the essence of the right created, and the limitation is an inherent part of the statute, under which the right in question arises, so that there is no right of action independent of the limitation, the limitation differs from the ordinary Statute of Limitations. Many of the leading principles which apply to a pure Statute of Limitations, such as pleading the statute, are inapplicable.⁷³ The liability and the remedy

ern Stage Co., 24 Iowa, 515 (1868);
22 id. 556 (1867).

⁶⁷ Kennedy v. Burrier, 36 Mo.
128 (1865).

⁶⁸ Ewell v. Chicago &c. Ry. Co.,
29 Fed. Rep. 57 (1886).

⁶⁹ Section 2532 of the Iowa Code provides that "placing the notice in the hands of the sheriff for immediate service * * * shall, so far as the Statute of Limitations is concerned, be deemed the commencement of the action." Ewell v. Chicago &c. Ry. Co., 29 Fed. Rep. 57 (1886). Filing claim with town clerk is a "presentment" of claim within meaning of § 4242, Rev. Stats. of Wis. Parish v. Town of Eden, 62 Wis. 272 (1885). A suit is not commenced by the signing and sealing of a summons which has been in the attorney's office, without any purpose of immediate service. Lynch v. New York &c. R. R. Co., 28 Vr. 4

(1894). In those States in which municipalities are liable for injuries, by statute, a notice must be given of the claim before an action can be brought, are not applicable to actions brought for damages for injuries resulting in death. Clark v. City of Manchester, 62 N. H. 577 (1883); Jewett v. Keene, id. 701 (1883); McKeigue v. City of Janesville, 68 Wis. 50 (1887).

⁷⁰ Gen. Stats. Ky., chap. 71, art. 3, § 3; art. 4, § 2; Louisville &c. R. Co. v. Sanders, 86 Ky. 259 (1887). Such as a posthumous child. Nelson v. Galveston &c. Ry. Co., 78 Tex. 621 (1890).

⁷¹ Nelson v. Galveston &c. Ry. Co., 78 Tex. 621 (1890); Paschal v. Owen, 77 id. 583 (1890).

⁷² O'Shields v. Georgia Pacific Ry. Co., 83 Ga. 621 (1889).

⁷³ 13 Am. & Eng. Ency. of Law (1st ed.), p. 689; Tiffany on Death

are created by the same statute; the limitation of the remedy is, therefore, to be treated as a limitation of the right.⁷⁴ The proviso is a condition qualifying the right of action, and not a mere limitation of the remedy;⁷⁵ it is a condition attached to the right to sue at all. It must be accepted in all respects as the statute gives it;⁷⁶ a subsequent change in the period of limitation will not extend the period, so as to affect an existing right of action.⁷⁷ Such limitation will be enforced by the courts of any State, wherein the plaintiff may sue;⁷⁸ thus, when an action is brought under a statute in a jurisdiction other than the one which created the statute, the action will be subject to the limitation.⁷⁹

§ 311. Such limitations need not be specially pleaded.—The rule is that a statute which *bars the remedy only*, must be pleaded, but a statute which *cuts off the right*, need not be pleaded, but may be relied upon as a protection if the facts appear.⁸⁰ The limitation in these statutes need not, therefore, be pleaded;⁸¹ for the reason, that there are exceptions to the Statute of Limitations, but in these statutes there are no exceptions.⁸² They are not considered to be waived if not

by Wrongful Act, § 120 *et seq.*; was appointed does not vary the Wood on Limitations, § 1; The rule. Best v. Town of Kinston, Harrisburg, 119 U. S. 199, 214 106 No. Car. 205 (1890). (1886); Hill v. New Haven, 37 Vt. 77 Benjamin v. Eldridge, 50 Cal. 501 (1865); Chiles v. Drake, 2 Metc. 612 (1875); Pittsburg &c. Ry. Co. v. Hine, 25 Ohio St. 629 (1874). 146 (1859, Ky.); George v. Chicago &c. Ry. Co., 51 Wis. 603 (1881); 78 Boyd v. Clark, 8 Fed. Rep. Best v. Town of Kinston, 106 No. 849 (1881). Car. 205 (1890); Taylor v. Cranberry Iron Co., 94 id. 525 (1886). 79 The Harrisburg, 119 U. S. 199 (1886); Londrigan v. New York &c. R. R. Co., 5 Civ. Pro. Rep. 76 (1883); Krogg v. Atlanta &c. R. R. Co., 77 Ga. 202 (1886).

⁷⁴ The Harrisburg, 119 U. S. 199, 214 (1886). See Eastwood v. Kennedy, 44 Md. 563 (1876), same principle.

⁷⁵ Pittsburg &c. Ry. Co. v. Hine, 25 Ohio St. 629 (1874). "The limitation is descriptive of the right created." Hanna v. Jeffersonville R. R. Co., 32 Ind. 114 (1869).

⁷⁶ Taylor v. Cranberry Iron Co., 94 No. Car. 525 (1886). It is not strictly a statute of limitation. Ib. The fact that no administrator

⁸⁰ Bonnar v. Hayler, 7 Lea, 85, 89 (1889); Hanna v. Jeffersonville R. R. Co., 32 Ind. 113 (1869); Jeffersonville &c. R. R. Co. v. Hendricks, 41 id. 48 (1872); George v. Chicago &c. R. R. Co., 51 Wis. 603 (1881).

⁸¹ Ib.

⁸² Jeffersonville &c. R. R. Co. v. Hendricks, 41 Ind. 48 (1872).

pleaded.⁸³ If the declaration or complaint shows that the action was not brought within the time limited, it is demurrable.⁸⁴ No excuse can be alleged for the delay;⁸⁵ such as the time between the death and the appointment of the administrator.⁸⁶

§ 312. **Releases for personal injuries.**—Releases made in consideration of an amount of money agreed upon, as compensation for personal injuries, are valid.⁸⁷ They will be set aside by the courts, if procured by fraud or misrepresentation;⁸⁸ or if they were not fully understood by the party signing.⁸⁹ But mere inability to read English or understand the contents, is not a sufficient excuse for holding them invalid.⁹⁰ Mere failure to read the release, when the person signing had the capacity to read, and no fraud was practiced, is not sufficient to avoid the release.⁹¹ Nor when subsequent developments showed that the injuries suffered, were greater than was apparent, at the time

⁸³ *Cooper v. Lyons*, 9 Lea, 596, 601 (1882).

⁸⁴ *George v. Chicago &c. R. R. Co.*, 51 Wis. 603 (1881); *Hanna v. Jeffersonville R. R. Co.*, 32 Ind. 113 (1869).

⁸⁵ *Hill v. New Haven*, 37 Vt. 501 (1865); *Taylor v. Cranberry Iron Co.*, 94 No. Car. 525 (1886); *Hanna v. Jeffersonville &c. R. R. Co.*, 32 Ind. 113 (1869); *George v. Chicago &c. R. R. Co.*, 51 Wis. 603 (1881).

⁸⁶ *Rugland v. Anderson*, 30 Minn. 386 (1883). Otherwise by the Texas and Kentucky statutes, which make the ordinary disabilities available in this class of cases. *Nelson v. Galveston &c. Ry. Co.*, 78 Tex. 621 (1890); *Louisville &c. R. R. Co. v. Sanders*, 86 Ky. 259 (1887).

⁸⁷ *Chicago &c. Coal Co. v. Peterson*, 39 Ill. App. 114 (1890); *Wojciechowski v. Spreckels Sugar Refining Co.*, 177 Pa. St. 57 (1896); *Gibson v. Western &c. R. R. Co.*, 164 id. 142 (1894).

⁸⁸ *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183 (1869).

⁸⁹ *Chicago &c. R. R. Co. v. Doyle*, 18 Kan. 58 (1877); *Shultz v. Chicago &c. Ry. Co.*, 44 Wis. 638 (1878); *Butler v. Regents of the University*, 32 id. 124 (1873); *Sheanron v. Pacific Mut. Life Ins. Co.*, 83 id. 507, 527 (1892); *Whitney &c. Co. v. O'Rourke*, 172 Ill. 177 (1898).

⁹⁰ *Albrecht v. Milwaukee &c. Ry. Co.*, 87 Wis. 105 (1894).

⁹¹ *Wallace v. Chicago &c. Ry. Co.*, 67 Iowa, 547 (1885); *McCormack v. Molburg*, 43 id. 561 (1876); *McKenney v. Herrick*, 66 id. 414 (1885); *Squires v. Inhabitants of Amherst*, 145 Mass. 192 (1887); *Pratt v. Castle*, 91 Mich. 484 (1892); *Germania Fire Ins. Co. v. Memphis &c. R. R. Co.*, 72 N. Y. 90 (1878). See *Albrecht v. Milwaukee &c. Ry. Co.*, 87 Wis. 105 (1894).

the release was executed. Such fact will not vitiate the release. The plaintiff cannot recover for such extended nature of the injury sustained.⁹² But if executed when under the influence of drugs and opiates it is void;⁹³ or if, at the time it was signed, the person signing, was sick in bed from the effects of his injuries, and was unable by reason of dizziness to read it, a release signed under such circumstances has been held void;⁹⁴ or if executed while *non compos mentis*.⁹⁵ Or if obtained after an action has been commenced, and counsel employed, in the absence of plaintiff's counsel, and without his consent or knowledge, unless the utmost good faith is shown on the part of the defendant in obtaining the release.⁹⁶

§ 313. Releases by parents — Husband and wife.— When a child sues to recover damages for a personal injury, the father cannot dismiss, release or compromise the suit.⁹⁷ A release by a husband is no defense;⁹⁸ because at common law the husband could not release the action for an injury to the person of the wife, nor can the husband settle the suit or control its pro-

⁹² Seeley v. Citizens Traction Co., 179 Pa. St. 334 (1897); Kane v. Chester Traction Co., 186 id. 145 (1898).

⁹³ Chicago &c. R. R. Co. v. Doyle, 18 Kan. 58 (1877).

⁹⁴ Lusted v. Chicago &c. Ry. Co., 71 Wis. 391 (1888).

⁹⁵ Gibson v. Western &c. R. R. Co., 164 Pa. St. 142 (1894). But it may be afterwards ratified, when restored to sound mind. *Ib.*

⁹⁶ Bussian v. Milwaukee &c. Ry. Co., 56 Wis. 335, 337 (1882). Obtained by a physician attending an illiterate woman who was injured. Eagle Packet Co. v. Defries, 94 Ill. 598 (1880). It is not necessary, in pleading a release, that it should be averred that it was under seal. A release *ex vi termini* imports a seal; and it is a matter of evidence, whether it has a seal or

not, if a seal be necessary. Illinois Central R. R. Co. v. Read, 37 Ill. 484 (1865).

⁹⁷ Isaacs v. Boyd, 5 Port. 388 (Ala. 1837). Nor give a release before suit. Palmer v. Conant, 58 Hun, 333 (1890). See Power v. Harlow, 57 Mich. 107 (1885). "The mother could not release it even for full consideration and by the most formal instrument; much less, therefore, could she, by mere word of mouth, when not under oath, or otherwise chargeable with responsibility, destroy his right of action by her admissions." Cooley, J., in Power v. Harlow, 57 Mich. 111 (1885).

⁹⁸ To a suit brought by wife's personal representative. South. &c. R. R. Co. v. Sullivan, 59 Ala. 272 (1877).

ceeds independently of the administrator.⁹⁹ At common law a right of action to recover damages for personal injuries to a married woman, cannot be discharged by her separate release.¹

§ 314. **Release or payment for personal injury — Bar to suit for causing death.**—A release by the person injured, of his right of action, is a bar to a suit for causing the death;² or a contract not to claim compensation for personal injury, whether resulting in death or not.³ So a receipt signed by deceased, acknowledging payment in full for the injury;⁴ or a recovery of damages by a judgment by the injured person in his lifetime,⁵ and this for the reason that an action for a cause of action liquidated and satisfied, cannot survive in favor of any person.⁶ But the fact that a suit commenced by the deceased was pending at his death is no bar;⁷ if the plaintiff dies, from some other cause than such injury, the action will survive and may be prosecuted in the name of the administrator.⁸

§ 315. **Release or payment for causing death.**—A claim for damages for causing death by negligence, cannot be barred or released by payment, to a person before his appointment as administrator, but if the money was used for burial expenses of the deceased, it may be credited by the jury in estimating dam-

⁹⁹ Long v. Morrison, 14 Ind. 595 (1860). *Contra*, See Pennsylvania R. R. Co. v. Goodenough, 26 Vr. 577, 592 (1893).

¹ Howard v. Chesapeake &c. Ry. Co., 11 App. Cas. (D. C.) 300 (1897). So held to be the law in the District of Columbia. *Ib.*

² Tiffany on Death by Wrongful Act, 125; Read v. Great Eastern Ry. Co., 9 B. & S. 714; L. R., 3 Q. B. 555 (1868). See Roesner v. Herman, 10 Biss. 485 (1881); 8 Fed. Rep. 782.

³ Griffiths v. Earl of Dudley, 9 Q. B. D. 357 (1882); Haigh v. Royal Mail &c. Co., 52 L. J., Q. B. D. (N. S.) 640 (1883).

⁴ Dibble v. New York &c. R. R. Co., 25 Barb. 183 (1857).

⁵ Littlewood v. Mayor &c. New York, 89 N. Y. 24 (1882); Price v. Richmond &c. R. R. Co., 33 So. Car. 556 (1890); Hecht v. Ohio &c. Ry. Co., 132 Ind. 507 (1892).

⁶ Hecht v. Ohio &c. Ry. Co., 132 Ind. 507 (1892).

⁷ International &c. Ry. Co. v. Kuehn, 70 Tex. 582 (1888); Indianapolis &c. R. R. Co. v. Stout, 53 Ind. 143 (1876). An action for damages, for an injury to the person of the plaintiff, abates by his death, and the pendency thereof, cannot be pleaded in bar, for an action brought by his personal representative for his death.

⁸ Chicago &c. R. R. Co. v. O'Connor, 119 Ill. 586 (1886).

ages.⁹ The claim can only be barred or released before suit by some person, who has, at the time authority to bring the action.¹⁰ But a release and settlement made by the administrator,¹¹ or a beneficiary,¹² is valid and binding, on the parties interested in the claim.¹³

§ 316. **Releases — How impeached.**— Releases which are void, may be impeached and barred, as a defense in an action at law;¹⁴ a return of the consideration paid, is not a condition precedent to the commencement and prosecution of an action, it may be deducted by the jury, from the amount of damages awarded.¹⁵

⁹ *Stuber v. McEntee*, 142 N. Y. 200 (1894). A receipt which stated, that the payment was for all expenses caused by the death, not a settlement of claim or bar to the action. *Ib.*

¹⁰ *Stuber v. McEntee*, 142 N. Y. 200 (1894).

¹¹ Has a right to control the suit. *Henchey v. City of Chicago*, 41 Ill. 136 (1866); *Hartigan v. Southern Pacific Co.*, 86 Cal. 142 (1890). An executor has authority, with approval of Probate Court, to compromise claim. *Ib.*; *Parker v. Providence &c. Steamboat Co.*, 17 R. I. 376 (1891).

¹² By widow — children bound. *Greenlee v. East Tenn. &c. R. R. Co.*, 5 Lea, 418 (1880). *Stephens v. Nashville &c. Ry. Co.*, 10 id. 448 (1882); *Holder v. Nashville &c. R. R. Co.*, 92 Tenn. 141 (1892). Under section 1510, Code 1880. *Natchez &c. Co. v. Mullins*, 67 Miss. 672 (1890); *Guldager v. Rockwell*, 14 Colo. 459 (1890); *Stuebning v. Marshall*, 10 Daly, 406 (1882). Widow under section 4256, Rev. Stats. *Schmidt v. Deegan*, 69 Wis. 300 (1887); *Knoxville &c. R. R. Co. v. Acuff*, 92 Tenn. 26 (1892).

¹³ Namely, the husband, widow, children or next of kin of the deceased. *Parker v. Providence &c.*

Steamboat Co., 17 R. I. 376 (1891). Either before or after bringing an action. *Ib.* Under section 377, Code of Civil Procedure, an action may be brought by either the heirs or the personal representative, but separate actions cannot be brought by both, and a former recovery by an executor, may be pleaded and proved, in bar to an action subsequently brought, by the heirs of one killed through the negligence of the defendant. *Hartigan v. Southern Pacific Co.*, 86 Cal. 142 (1890).

¹⁴ *Bussian v. Milwaukee &c. Ry. Co.*, 56 Wis. 325, 333 (1882); *Lusted v. Chicago &c. Ry. Co.*, 71 id. 391 (1888); *Chicago &c. R. R. Co. v. Doyle*, 18 Kan. 58 (1877); *Wallace v. Chicago &c. Ry. Co.*, 67 Iowa, 547 (1885).

¹⁵ *Sheanron v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507 (1892); *Shaw v. Webber*, 79 Hun, 307 (1894); *Chicago &c. R. R. Co. v. Doyle*, 18 Kan. 58 (1877). *Contra*, *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75 (1881); *Pangborn v. Continental Ins. Co.*, 67 Mich. 683 (1887); *International &c. Ry. Co. v. Brazzil*, 78 Tex. 314 (1890); *Norwich Union Fire Ins. Soc. v. Girtton*, 124 Ind. 217 (1890).

§ 317. **Sealed and unsealed releases — Distinction.**—There is a distinction in legal effect, between a release under seal and one not under seal. The former is an absolute one; its meaning cannot be controlled by parol evidence, and the law raises a conclusive presumption that it was given in full satisfaction, in fact, for the injury, and upon a sufficient consideration; the latter must be shown by evidence, was intended to operate, in fact, as a full satisfaction.¹⁶ If it be shown or proved that the payment was intended as a partial satisfaction by one wrongdoer, it *pro tanto*, but no further, discharges the other tort-feasors.¹⁷ It is proper to be shown, and should be taken into consideration by the jury, *i. e.*, a partial satisfaction, in assessing damages, and it may be shown under a general denial;¹⁸ where there is a conflict of evidence, as to the agreement, the question is one of fact for the jury.¹⁹

§ 318. **Payment — Judgment — Release of one joint tort-feasor releases all.**—A payment or satisfaction from one of several joint tort-feasors is a bar, and good defense in law, to an action against the others, for the same cause of action.²⁰ Although the plaintiff recover several judgments, he can have but one payment and satisfaction;²¹ so a release to one of such joint tort-feasors, is a good defense by the others.²² Although

¹⁶ Ellis v. Esson, 50 Wis. 138, 146 (1880); Line v. Nelson, 9 Vr. 358 (1876); Turner v. Hitchcock, 20 Iowa, 310, 331 (1866); Eastman v. Grant, 34 Vt. 387 (1861).

¹⁷ McCrillis v. Hawes, 38 Me. 566 (1854); Snow v. Chandler, 10 N. H. 92 (1839); Chamberlin v. Murphy, 41 Vt. 110 (1868); Ellis v. Esson, 50 Wis. 138 (1880).

¹⁸ Knapp v. Roache, 94 N. Y. 329 (1884).

¹⁹ Ellis v. Esson, 50 Wis. 138 (1880).

²⁰ Thomas on Neg., p. 1119; Severin v. Eddy, 52 Ill. 189 (1869); Gross v. Pennsylvania &c. R. R. Co., 65 Hun, 191 (1892); Barrett v. Third Ave. R. R. Co., 45 N. Y. 628 (1871); Donaldson v. Carmichael, 102 Ga. 40 (1897).

²¹ Severin v. Eddy, 52 Ill. 189 (1869); Gross v. Pennsylvania &c. R. R. Co., 65 Hun, 191 (1892); Turner v. Hitchcock, 20 Iowa, 310 (1866). A judgment, without satisfaction, recovered against one of two joint debtors, is a bar to an action against the other, and it is pleadable in bar and not in abatement. King v. Hoare, 13 M. & W. 494 (1844).

²² Barrett v. Third Ave. R. R. Co., 45 N. Y. 628 (1871); North Pennsylvania R. R. Co. v. Mahoney, 57 Pa. St. 187 (1868); Ellis v. Esson, 50 Wis. 138 (1880); Seither v. Philadelphia Traction Co., 125 Pa. St. 397 (1889); Turner v. Hitchcock, 20 Iowa, 310 (1866). "The reason of the rule," that the release of one is the release of all,

by the terms of the release to one tort-feasor, the claim is in terms expressly reserved against the others, yet the release operates in behalf of the other tort-feasors.²³ An attorney-at-law, as such merely, cannot settle a suit and give a release, concluding his client in relation to the subject in litigation, although it is within his authority to discontinue the action.²⁴ If the plaintiff intermarries with one of the joint tort-feasors after the commission of the tort, it operates to discharge all the wrongdoers.²⁵ An agreement not to sue one of several tort-feasors, is a discharge of that one,²⁶ and unless it appeared that this was not a settlement for all the damages sustained by the plaintiff, it would operate as a discharge of all the other persons. Courts favor the construction that a payment, not being or operating as a full satisfaction, is a covenant not to sue.²⁷ A judgment in favor of one joint tort-feasor is a bar to an action brought by the same plaintiff, against the other joint tort-feasors, for the same cause of action.²⁸ The acceptance of a verdict and judgment against one tort-feasor, is not *conclusive* evidence, of a compromise of a claim for damages, and should be left to a jury, under proper instructions, for their decision.²⁹ Mere dismissal of a suit against one joint tort-feasor, does not release the others.³⁰

"seems," says Mr. Justice Bronson, "to be, that the deed, being taken most strongly against the releasor, is conclusive evidence that he has been *satisfied for the wrong*; and, after satisfaction, although it moved from only one of the tort-feasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done." *Bronson v. Fitzhugh*, 1 Hill, 185, 186 (N. Y. 1841).

²³ *Ellis v. Esson*, 50 Wis. 138 (1880); *Delong v. Curtis*, 35 Hun, 94 (1885).

²⁴ *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628 (1871).

²⁵ *Turner v. Hitchcock*, 20 Iowa, 310 (1866).

²⁶ *Eastman v. Grant*, 34 Vt. 390 (1861).

²⁷ *Line v. Nelson*, 9 Vr. 358, 360 (1876); *Russell v. Adderton*, 64 No. Car. 417 (1870).

²⁸ *Featherston v. Prest. Newburgh &c. Co.*, 71 Hun, 109 (1893); *Turner v. Hitchcock*, 20 Iowa, 310 (1866). See *Herman on Estoppel*, p. 169.

²⁹ *Owen v. Brockschmidt*, 54 Mo. 285 (1873). A satisfaction of a judgment against one, is a bar to an action against the other joint tort-feasor. *Snyder v. Witt*, 99 Tenn. 618 (1897).

³⁰ *West Chicago &c. R. R. Co. v. Piper*, 165 Ill. 325 (1897). In the absence of proof of a release or accord and satisfaction. *Ib.*

§ 319. **Actions for causing death — Defenses — Civil and criminal action — Merger.**—Lord Campbell's Act provides, that when "the act, neglect or default is such as would, if death had not ensued, have entitled the party injured, to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages."³¹ Whatever would be a defense to the action, had not death ensued, if brought by the person for the injury, can be set up as a defense,

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| 31 England: 9 & 10 Vict., chap. 93, § 1. | Nevada: Gen. Stats. 1885, § 3898. |
| New Brunswick: Consol. Stats., chap. 86, § 1. | New Jersey: Rev. 1877, p. 294, § 1; Gen. Stats. (vol. 1), p. 1188. |
| Nova Scotia: Rev. Stats. 1884, chap. 116. | New Mexico: Comp. Laws 1884, as amended by Laws 1801, chap. 49, § 2309. |
| Ontario: Rev. Stats. 1887, chap. 135. | New York: Ann. Code Civ. Pro. 1888, § 1902. |
| Alabama: Code 1887, § 2589. | North Carolina: Code 1883, § 1498. |
| Arizona: Rev. Stats. 1887, § 2146. | Ohio: Rev. Stats., as amended by Act of April 13, 1880, § 6134. |
| Arkansas: Mansf. Dig., § 5225. | Oklahoma: Stats. 1890, chap. 70, art. 4, par. 4338. |
| Colorado: Gen. Stats. 1883, § 1031. | Oregon: Hill's Code, § 371. |
| District of Columbia: Act of Cong., Feb. 17, 1885; 23 Stats., chap. 126, p. 307. | Rhode Island: Pub. Stats., chap. 204, § 20. |
| Florida: Laws of 1883, chap. 3439, § 1. | South Carolina: Gen. Stats. 1882, § 2183. |
| Illinois: 1 Starr. & C. Ann. Stats., chap. 70. | Tennessee: Mill & V. Code, § 3130. |
| Indiana: Rev. Stats., 1881, § 284. | Texas: Sayles' Civil Code, art. 2900. |
| Kansas: Gen. Stats. 1889, par. 4518. | Utah: Comp. Laws 1888, § 2961. |
| Maine: Acts of 1891, chap. 124. | Vermont: Rev. Laws 1880, § 2138. |
| Maryland: Pub. Gen. Laws, art. 67, § 1. | Virginia: Code 1887, § 2902. |
| Michigan: How. Stats., §§ 8313, 3391, 3491. | Washington: Hill's Ann. Stats. & Code 1891, § 703. |
| Minnesota: Laws of 1891, chap. 123, § 1. | West Virginia: Code, chap. 103, § 5. |
| Mississippi: Code 1892, § 663. | Wisconsin: Rev. Stats. 1878, § 4255. |
| Missouri: Rev. Stats. 1889, § 4426. | Wyoming: Rev. Stats. 1887, § 2364a. |
| Montana: Comp. Stats. 1888, p. 911, § 981. | |
| Nebraska: Comp. Laws 1881, chap. 21, § 1. | |

to the statutory action for the death;³² such as contributory negligence;³³ or that the death was caused by the negligence of a fellow servant, and the like. Many of the statutes, including Lord Campbell's Act, provide, that the action may be maintained for causing the death of a human being by wrongful act, neglect or default, "although the death shall have been caused under such circumstances as amount in law to a felony."³⁴ The Alabama statute provides that such action, "may be maintained though there has not been prosecution or conviction or acquittal of the defendant for such wrongful act, or omission or negligence."³⁵ Under these statutes, it is gen-

³² Tiffany on Death by Wrongful Act, § 65.

³³ Beach on Cont. Neg. (3d. ed.), § 60; Thomas on Neg. 1279; Shearm. & Redf. on Neg. (5th ed.), § 65; Hamilton v. Delaware &c. R. R. Co., 21 Vr. 263 (1888); id. 478; Telfer v. Northern R. R. Co., 1 id. 188 (1862).

³⁴ England: 9 & 10 Vict., chap. 93.

Nova Scotia: Rev. Stats. 1884, chap. 116, § 1.

Ontario: Rev. Stats. 1887, chap. 135, § 2.

Arizona: Rev. Stats. 1887, § 2148.

Arkansas: Mansf. Dig., § 5225.

District of Columbia: Act of Cong., Feb. 17, 1885, 23 Stat., p. 307, chap. 126.

Florida: Laws 1883, chap. 3439, § 1.

Illinois: 1 Starr & C. Ann. Stats., chap. 70, § 1.

Maryland: Pub. Gen. Laws, art. 67, § 1.

Michigan: How. Stats., §§ 8313, 3391, 3491.

Montana: Comp. Stats. 1888, p. 911, § 981.

Nebraska: Comp. Laws 1881, chap. 21, § 1.

Nevada: Gen. Stats. 1885, § 3898.

New Jersey: Rev. 1877, p. 294, § 1; Gen. Stats. (vol. 1), p. 1188.

North Carolina: Code 1883, § 1498.

Ohio: Rev. Stats., as amended by Act of April 13, 1880, § 6134, "Although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter." *Ib.*

South Carolina: Gen. Stats. 1882, § 2183.

Texas: Sayles' Civ. Stats., art. 2902.

Utah: Comp. Laws 1888, § 2961.

Vermont: Rev. Laws 1880, § 2138.

Virginia: Code 1887, § 2902.

West Virginia: Code, chap. 103, § 5, same as Ohio.

Wyoming: Rev. Stats. 1887, § 2364a, same as Ohio.

³⁵ Alabama: Code 1887, § 2589.

Arizona: Rev. Stats. 1887, § 2148. "Without regard to any criminal proceeding that may or may not be had in relation to the homicide."

Georgia: Code 1882, § 2970. "If the injury amounts to a felony, as defined by this Code, the person injured must either simultaneously or concurrently or previously

erally held, that the failure to prosecute, where felony was involved in the act complained of, is not allowed as a defense,³⁶ even though it is not so expressly provided in the statute. A right of action for an injury done in the commission of a felony or misdemeanor, is not merged in the public offense. A criminal prosecution by the State and a civil action for damages, arising from the same act, may be carried on at the same time, against the defendant. A judgment of acquittal in the public prosecution will constitute no defense, in the civil suit, for the same defendant; nor for his abettor.³⁷ Prosecution for felony is not a condition precedent to the recovery of damages, actual or punitive, for a personal injury.³⁸

prosecute for the same, or allege a good excuse for the failure so to prosecute." *Allen v. Atlanta &c. R. R. Co.*, 54 Ga. 503 (1875); *Western &c. R. R. Co. v. Sawtell*, 65 id. 235 (1880); *South Carolina R. R. Co. v. Nix*, 68 id. 572 (1882).

Iowa: *McClain's Ann. Code*, § 3731. "The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of, and in addition to, the punishment of the latter."

Missouri: *Rev. Stats.* 1889, § 3970. "In no case shall the right of action of any party injured by the commission of any felony or misdemeanor be deemed or adjudged to be merged in such felony or misdemeanor." *Gray v. McDonald*, 104 Mo. 303 (1891).

New York: *Ann. Code Civ. Pro.* 1888, § 1899. "Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other."

Rhode Island: *Pub. Stats.*, chap. 204, § 19. "To maintain such actions, it shall not be necessary, first to institute criminal proceedings against the defendants."

Texas: *Sayles' Civ. Stats.*, art. 2902. "Without regard to any criminal proceeding that may or may not be had in relation to the homicide."

Quebec: *Civ. Code, L. Can.*, art. 1056. "These actions are independent, and do not prejudice the criminal proceedings to which the parties may be subject."

³⁶ *Tiffany on Death by Wrongful Act*, § 79; *Lofton v. Vogles*, 17 Ind. 105 (1861); *Lankford v. Barrett*, 29 Ala. 700 (1857); *Newell v. Cowan*, 30 Miss. 492 (1855); *Hyatt v. Adams*, 16 Mich. 180, 187 (1867).

³⁷ *Gray v. McDonald*, 104 Mo. 303 (1891).

³⁸ *Powell v. Augusta &c. R. R. Co.*, 77 Ga. 192 (1886).

CHAPTER XIII.

CONTRIBUTORY NEGLIGENCE.

- § 320. General statement — Scope of the chapter.
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- 322. Elements of contributory negligence.
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§ 320. **General statement—Scope of the chapter.**—Contributory negligence, as a defense to actions brought to recover damages for injuries caused by negligence, has been the occasion of judicial investigation, probably, in more cases than any other one subject in the law, during the past twenty years. The law of contributory negligence has been developed by the courts, during the present century.¹ As a defense in the trial of accident cases, it has been applied to a variety of circumstances and facts, from which the courts have evolved a number of definite rules. These measure the standard of care exacted from all persons, or failure to observe such care, and injury ensuing as a proximate cause; they will be guilty of contributory negligence, and remediless for such injuries, in the courts. The courts have defined and expressed with precision, the rule, which marks the line, dividing the province of the court, from that of the jury, on this subject. The particular facts and circumstances of many cases taken from the reports of the courts, have been collected in digests, encyclopedias and text-books,² so that any new attempt to collect all the reported cases on the subject of contributory negligence, within the compass of a single chapter, would be not only impossible, but of comparatively little value. It is not here intended to attempt to do more, than state the general principles of the law of contributory negligence, as declared by the courts.

§ 321. **Definitions.**—Many definitions of contributory negligence have been formulated by authors of text-books and by judges.³ But it is believed that no definition has been given, and

¹ *Butterfield v. Forrester*, 11 East, 60 (1809), decided by Lord Ellenborough, is the first reported case.

² *Beach on Cont. Neg.* (3d ed.), Thomas on Neg., p. 357; Ray on Negligence of Imposed Duties, chap. 20; *Shearm. & Redf. on Neg.* (5th ed.), chap. 6; 7 *Eng. & Am. Ency. of Law* (2d ed.), p. 368.

³ "Contributory negligence, in its legal signification, is such an act or omission on the part of the plaintiff, amounting to a want of

ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." *Beach on Cont. Neg.* (3d ed.), § 7. See 7 *Am. & Eng. Ency. of Law* (2d ed.), p. 371. "Contributory negligence is the want of reasonable care on the part of the person injured, which concurs with the negligence of the servants or employes of the defendant inflicting the injury." *Texas &c. Ry. Co. v. Curlin*, 13

none can be given, which is accurate and comprehensive enough, to apply to all cases as they may arise. Comprehensive legal terms cannot be defined with mathematical precision. It has been said, in legal literature that definitions, at best, are but descriptive of the thing defined. They do not define absolutely, but relatively. Contributory negligence is that conduct on the part of the sufferer from an injury to the cause of it, precluding him from recovery against the wrongdoer.⁴

§ 322. **Elements of contributory negligence.**—Contributory negligence is that conduct of the plaintiff — *i. e.*, the want of ordinary care — which proximately contributes to the cause of the injury.⁵ The negligent act of the plaintiff must contribute, proximately, to the injury, else the right of the plaintiff will not be defeated by such act.⁶ To conclude the plaintiff from maintaining his action, his conduct must have been negligent, and his negligence must have contributed to the injury, in such a way, that, if he had not been negligent, he would have received no injury from the negligence of the defendant.⁷ Although the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.⁸ Some of the judges have said, that the negligence of the plaintiff

Tex. Civ. App. 505 (1896). Sometimes the word "concur" or "co-operate" is used. *Jacob v. Louisville & C. R. R. Co.*, 10 Bush, 263, 273 (1874); *Kentucky Central R. R. Co. v. Thomas*, 79 Ky. 160, 164 (1880).

⁴ *Standard Dict. of the English Language* (vol. 1), p. 409.

⁵ *Radley v. Northwestern Ry. Co.*, L. R., 1 App. Cas. 754 (1876); *Dudley v. Camden & C. Ferry Co.*, 16 Vr. 368 (1883); *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268 (1898).

⁶ *Pennsylvania R. R. Co. v. Righter*, 13 Vr. 180 (1880).

⁷ *Smith v. Irwin*, 22 Vr. 507 (1889); 7 *Am. & Eng. Ency. of Law* (2d ed.), p. 373.

⁸ *Radley v. Northwestern Ry. Co.*, L. R., 1 App. Cas. 754, 759 (1876), following *Davies v. Mann*, 10 M. & W. 546 (1842). The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. In *Shearm. & Redf. on Neg.* (5th ed.), § 99, n., it is said this principle, first enunciated in *Davies v. Mann*, 10 M. & W. 546, in different language, has been accepted by every court in England, including the House of Lords, by the United

must *substantially* contribute to produce the injury;⁹ or it must be an *efficient* cause of the injury;¹⁰ or that it must *directly* contribute to the injury.¹¹ If, after the injury has been done to the plaintiff by the wrongdoer, the plaintiff is negligent, thereby aggravating the injury, such negligence of the plaintiff, will not defeat his right to recover damages, for so much of the injury, as the original wrongdoer caused, by his negligence.¹²

States Supreme Court, and by every court in the Union, except possibly Pennsylvania. *Neet v. Burlington &c. Ry. Co.*, 106 Iowa, 248 (1898); *Dailey v. Burlington &c. R. R. Co.*, Neb. ; 6 Am. Neg. Rep. 112 (1899). *Contra*, *Pennsylvania Co. v. Sinclair*, 62 Ind. 307 (1878).

⁹ *Daley v. Norwich &c. R. R. Co.*, 26 Conn. 591 (1858). "Essentially contribute." *Montgomery Gas Light Co. v. Montgomery &c. Ry. Co.*, 86 Ala. 372, 381 (1888).

¹⁰ *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81 (1872).

¹¹ *Tuff v. Warman*, 2 C. B. (N. S.) 740, 753 (1857); *Orleans Village v. Perry*, 24 Neb. 831, 836 (1888). The use of the word *directly* contributed, held error in a charge by the Court of Appeals of New York. *Button v. Hudson River R. R. Co.*, 18 N. Y. 248, 259 (1858). Where an accident or injury has been caused by the concurring and approximately simultaneous fault of both parties, neither can recover from the other. *Louisville &c. R. R. Co. v. Wolfe*, 80 Ky. 82, 85 (1882). It is sometimes called "mutual negligence." *Trow v. Vermont Central R. R. Co.*, 24 Vt. 487, 495 (1852).

¹² *Stebbins v. Central Vt. R. R. Co.*, 54 Vt. 461 (1882). See 7 Am. & Eng. Ency. of Law (2d ed.), p. 388. Mr. Beach, in his work on Contributory Negligence, says: "The two essential elements in

contributory negligence are a want of ordinary care on the part of the plaintiff, and a casual connection between that and the injury complained of, the rule being that a plaintiff cannot recover damages for an injury he has sustained, if the injury could have been avoided by the exercise of ordinary care on his part." *Beach on Cont. Neg.* (3d ed.), § 19; *Whart. on Neg.*, § 301; 2 *Thomp. on Neg.* 1148, § 3. "Contributory negligence is a defense which confesses and avoids the plaintiff's case, and must be made out by showing affirmatively not only that the plaintiff was guilty of negligence, but that such negligence co-operated with negligence of the defendant to produce the injury." *Kentucky Central R. R. Co. v. Thomas*, 79 Ky. 160, 164 (1880). *Richardson, J.*: Contributory negligence, in contemplation of law, is such acts "or omissions, on the part of the plaintiff, amounting to a want of ordinary care, as concurring or co-operating with the negligent acts of the defendant, are a proximate cause or occasion of the injury complained of. It is a general principle, firmly imbedded in the law and conclusively settled, that such negligence will defeat a recovery." *Richmond &c. R. R. Co. v. Pickleseimer*, 85 Va. 798 (1889); *Shearm. & Redf. on Neg.* (5th ed.), §§ 93, 94.

§ 323. **Ordinary care — Reasonable care.**— Ordinary care is, such, as a person of ordinary prudence, exercises under the circumstances of the danger to be apprehended. The greater the danger, the higher the degree of care required, to constitute ordinary care, the absence of which is negligence.¹³

§ 324. **Cause — Proximate cause — Remote cause — Condition — Occasion — Defined and distinguished.**— A cause is the power or efficient agent producing the effect, result or event;¹⁴ a proximate cause is the direct, immediate cause to which a loss is to be attributed,¹⁵ it is distinguished from the remote cause, which is a cause other than the first cause.¹⁶ A condition is something that necessarily precedes a result, but does not produce it.¹⁷ An occasion is some event which brings a cause into action, at a particular moment.¹⁸ A "casual connection" or "proximate cause" is that cause which naturally led to, and which might have been expected to produce the result.¹⁹ It is the negligence occurring at the time the injury happened.²⁰ It is that negligence of the plaintiff, operating as an efficient cause of the injury, in connection with the fault of the defendant, which is a defense to the action.²¹ Mr. Justice Agnew, of

¹³ *Young v. Citizens Street R. R. Co.*, 148 Ind. 54, 58 (1896). For many definitions of "ordinary care," "reasonable care," see § 19; *Shearm. & Redf. on Neg.* (5th ed.), § 87; 7 Am. & Eng. Ency. of Law (2d ed.), p. 375.

¹⁴ *Standard Dict. of the English Language* (vol. 1), p. 302.

¹⁵ *Standard Dict. of the English Language* (vol. 1), p. 302; *Wiley v. West Jersey R. R. Co.*, 15 Vr. 251 (1882). Proximate and remote cause, 7 Am. & Eng. Ency. of Law (2d ed.), p. 381.

¹⁶ *Standard Dict. of the English Language* (vol. 1), p. 302. Distinction between proximate and remote cause. *Ploof v. Burlington Traction Co.*, 70 Vt. 509 (1898); *Isham v. Dow*, id. 588 (1898).

¹⁷ *Standard Dict. of the English*

Language (vol. 1), p. 302. Cause and condition distinguished. *State v. Baller*, 26 W. Va. 94 (1885). "Cause is meant that condition which determines the final result." *Ib.*

¹⁸ *Standard Dict. of the English Language* (vol. 1), p. 302.

¹⁹ *Willey v. Inhabitants of Belfast*, 61 Me. 569, 575 (1872); 7 Am. & Eng. Ency. of Law (2d ed.), p. 381. See *Scott v. Shepherd*, 2 Wm. Blackst. 892 (1772); *The Squib Case*; *Scheffer v. Washington City &c. R. R. Co.*, 105 U. S. 249 (1881).

²⁰ *Trow v. Vermont Central R. Co.*, 24 Vt. 487, 494 (1852); *Needham v. San Francisco &c. R. R. Co.*, 37 Cal. 409 (1869).

²¹ *Fairbanks v. Kerr*, 70 Pa. St. 86 (1871).

the Supreme Court of Pennsylvania, said: "Many cases illustrate, but none define, what is an immediate or what is a remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit every case."²² It is not a question of science or of legal knowledge. It is to be determined, as a fact, in view of the circumstances of fact attending it.²³ Proximate cause is usually a question for the jury.²⁴ "But the plaintiff's act or omission, when only a remote cause or a mere antecedent occasion or condition of the injury, is not contributory negligence."²⁵ It will be observed that the plaintiff's negligence is immaterial, unless it is a proximate cause of the injury.²⁶ It must contribute to the occurrence, and not simply to the amount of the injury, to defeat the action.²⁷

§ 325. Knowledge of the danger — Absent-mindedness.—

There must be knowledge of the danger, or sufficient reason to apprehend it, to put a reasonable and careful man on his guard, or there can be no contributory negligence.²⁸ He has a right to expect and rely upon the fact, that the defendant will comply with the law and act in conformity with a statute,²⁹ or an ordinance.³⁰ He is not bound to anticipate that the defendant will act in a negligent manner.³¹ Knowledge of danger by the plaintiff is not negligence *per se*, or exposure by the plaintiff to a known danger, is not always negligence.³² The plaintiff must act, un-

²² Fairbanks v. Kerr, 70 Pa. St. 86, 89 (1871).

²³ Milwaukee &c. Ry. Co. v. Kellogg, 94 U. S. 469, 474 (1876). See "proximate cause," § 21.

²⁴ Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 156 (1884); Knapp v. Sioux City &c. R. R. Co., 65 Iowa, 91 (1884); Lowery v. Manhattan Ry. Co., 99 N. Y. 158 (1885).
²⁵ 7 Am. & Eng. Ency. of Law (2d ed.), p. 372; Beach on Cont. Neg. (3d ed.), § 24; Fickett v. Lisbon Falls Fibre Co., 91 Me. 268 (1898).

²⁶ Pennsylvania R. R. Co. v. Righter, 13 Vr. 180 (1880); Gray v. Scott, 66 Pa. St. 345 (1870).

²⁷ Gould v. McKenna, 86 Pa. St.

297 (1878); Sills v. Brown, 9 Car. & P. 601 (1840); Stebbins v. Central Vermont R. R. Co., 54 Vt. 464 (1882).

²⁸ 7 Am. & Eng. Ency. of Law (2d ed.), p. 392.

²⁹ Klanowski v. Grand Trunk Ry. Co., 57 Mich. 525, 529 (1885).

³⁰ Hart v. Devereux, 41 Ohio St. 565 (1885); Meek v. Pennsylvania Co., 38 id. 632 (1883).

³¹ Shearm. & Redf. on Neg. (5th ed.), § 92.

³² 7 Am. & Eng. Ency. of Law (2d ed.), p. 392; Beach on Cont. Neg. (3d ed.), § 37. But there is a

class of cases which hold, that one cannot knowingly expose himself to danger and not be guilty of

der such circumstances, as a careful and prudent person would act for his own safety. Knowledge does not always, standing alone, constitute contributory negligence, because in some situations the plaintiff had by law a right to do what he did, even though he had knowledge that it was dangerous. Here the law exacts of him, the exercise of due care, with the knowledge which he possessed of the danger, which would necessarily be a higher standard of care, than if he did not possess such knowledge of the danger.³³ Thus, when one attempts to cross a railroad track, which is a known place of danger, the law requires that before crossing, you should use your eyes and ears, to watch for sign-boards and signals, to listen for bell or whistle, and to guard against the approach of a train, by looking each way before crossing.³⁴ Absent-mindedness of the fact, that the plaintiff knew of the danger, will not avail him as a legal excuse.³⁵

§ 326. **Reasons for the rule of contributory negligence.**—Various reasons have been given for the rule of contributory negligence; such as a refusal of the courts to apportion damages, which arise from negligence, or the inability of courts to mete out exact justice,³⁶ or that the defendant is not the cause of the injury, if the plaintiff's negligence contributes to it, because "by the interposition of the plaintiff's independent will the casual connection between the defendant's negligence and the in-

contributory negligence. *Frazer v. South. &c. R. R. Co.*, 81 Ala. 185 (1886); *Schoenfeld v. Milwaukee City Ry. Co.*, 74 Wis. 433 (1889); 502, 505 (1869).

Goldstein v. Chicago &c. Ry. Co., 46 id. 404 (1879); *Bassett v. Fish*, 75 N. Y. 303 (1878). ³⁵ *Lake Shore &c. R. R. Co. v. Miller*, 25 Mich. 274 (1872); *Baltimore &c. R. R. Co. v. Whitacre*, 35 Ohio St. 627, 638 (1880).

³³ *Beach on Cont. Neg.* (3d ed.), § 181. ³⁶ *Beach on Cont. Neg.* (3d ed.), § 12; *Shearm. & Redf. on Neg.*

³⁴ *Pennsylvania R. R. Co. v. Righter*, 13 Vr. 180 (1880); *Pittsburgh &c. Ry. Co. v. Collins*, 87 Pa. St. 405 (1878); *Baltimore &c. R. R. Co. v. Depew*, 40 Ohio St. 121 (1883); *Baxter v. Troy &c. R. Co.*, 41 N. Y. 502 (1869). An omission to look is immaterial, when by looking, the train could not have been seen. In such a case an omission to look could not have contributed to the injury. *Baxter v. Troy &c. R. Co.*, 41 N. Y. City Ry. Co., 502, 505 (1869).

jury is broken;"³⁷ or upon the maxim *volenti non fit injuria*: or upon the broad grounds of public policy;³⁸ or the impossibility of apportioning damages between the parties in a common-law action.³⁹

§ 327. **Pleading contributory negligence**—Under the common law and Code.—Under the common-law system of pleading, the defense of contributory negligence, can be made under a plea of the general issue.⁴⁰ Under the Code system, it has been generally held, that such defense can be made under an answer of general denial;⁴¹ but in two or three of the States, it has been held, that the facts constituting contributory negligence, must be specially set up and alleged in the answer.⁴²

§ 328. **Burden of proof — Conflicting decisions.**—The courts of the United States are not in harmony, on the principle upon which party the burden of proof, primarily rests, to show contributory negligence. By some of the State courts, it is held, that the burden of proof rests upon the plaintiff to show, as part of his case, freedom from contributory negligence, while the English courts, the Federal courts, and many of the State courts hold, that contributory negligence is a matter of defense, and the burden of proof rests on the defendant to establish it by evidence.⁴³

§ 329. **Question of law or fact.**—Contributory negligence is usually a question of fact for the jury, in view of all the facts and circumstances proven in the case. For an expression of the rule which defines the province of the court and the jury see section 279.⁴⁴ So, when the danger was known to the plaintiff, it is generally a question for the jury, whether he was in the exercise of due care in avoiding such known danger.⁴⁵

37 Whart. on Neg., § 300; Memphis &c. R. R. Co. v. Copeland, 61 Ala. 376 (1878). on the burden of proof, see §§ 169-171.

38 Beach on Cont. Neg. (3d ed.), chap. 16, § 444 *et seq.*; Shearm. & Redf. on Neg. (5th ed.), § 114; § 13.

39 Needham v. San Francisco &c. R. R. Co., 37 Cal. 409 (1869). Thomas on Neg., p. 365.

40 See § 164.

41 See § 164.

42 See § 164.

43 For a full collection of cases Mich. 447 (1887).

44 Beach on Cont. Neg. (3d ed.), chap. 16, § 444 *et seq.*; Shearm. & Redf. on Neg. (5th ed.), § 114; Thomas on Neg., p. 365.

45 Graham v. Manhattan Ry. Co., 149 N. Y. 336 (1896); Dewire v. Bailey, 131 Mass. 169 (1881); Harris v. Township of Clinton, 64

§ 330. **May be proved by direct or circumstantial evidence.**—Contributory negligence, or the absence of it, is proved by the same character of evidence as any other fact. The evidence may be either direct and positive, or circumstantial.⁴⁶ It is not necessary to produce an eye-witness to the accident, it is sufficient that the circumstances justify the inference.⁴⁷

§ 331. **Not a defense for willful injuries.**—"It is the settled rule, that when the defendant's conduct amounts to willfulness, and when the mischief is occasioned by his intentional and wanton wrongdoing, the plaintiff's negligence is no defense."⁴⁸ So, under the Kentucky statute, which permits punitive damages, where death results from the "willful negligence" of the defendant, contributory negligence is not a defense.⁴⁹

§ 332. **Actions for causing death — Beneficiaries.**—All the cases hold, that in actions brought for causing death, the contributory negligence of the deceased is available as a defense, to the same extent as if the action had been brought by the de-

⁴⁶ *Illinois Central R. R. Co. v. Cozby*, 174 Ill. 109 (1898). See § 171.

⁴⁷ *Lazelle v. Town of Newfane*, 69 Vt. 306 (1897); *Shearm. & Redf. on Neg.* (5th ed.), §§ 110-112.

⁴⁸ *Beach on Cont. Neg.* (3d ed.), § 64; *Shearm. & Redf. on Neg.* (5th ed.), § 64; *Thomas on Neg.*, p. 359; *Palmer v. Chicago &c. R. R. Co.*, 112 Ind. 250 (1887); *Pittsburgh &c. R. R. Co. v. Smith*, 26 Ohio St. 124 (1875); *Vandegrift v. Rediker*, 2 Zab. 185, 189 (1849). Wantonly, recklessly, or intentionally brought about the result. *Tanner v. Louisville &c. R. R. Co.*, 60 Ala. 621, 637 (1877); *Gothard v. Alabama &c. R. R. Co.*, 67 id. 114 (1880); *Banks v. Highland Street Ry. Co.*, 136 Mass. 485 (1884); *Chicago &c. R. R. Co. v. Bills*, 118 Ind. 221, 224 (1888). As where an injury results from the reckless running of

trains. *Palmer v. Chicago &c. R. R. Co.*, 112 Ind. 250 (1887). Or in actions for assault and battery, as where unnecessary force is used in ejecting passengers from trains. *Chicago &c. R. R. Co. v. Bills*, 118 Ind. 221 (1888). The doctrine of contributory negligence has no application in an action for assault and battery. *Ruter v. Foy*, 46 Iowa, 132 (1877); *Steinmetz v. Kelly*, 72 Ind. 442 (1880).

⁴⁹ *Gen. Stats. of Ky.*, chap. 57, § 3, passed March 10, 1854; *Jones v. Louisville &c. R. R. Co.*, 82 Ky. 610 (1885). "Willfulness and negligence are the opposites of each other, the one signifying the presence of intention or purpose, the other its absence." 7 *Am. & Eng. Ency. of Law* (2d ed.), p. 443; *Louisville &c. Ry. Co. v. Bryan*, 107 Ind. 54 (1886).

ceased in his lifetime.⁵⁰ These statutes, under which the action is brought for causing death, usually provide, that whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages therefor, then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages.⁵¹

§ 333. **Master and servant — Assumption of risks.**—Where a servant is injured, by the failure of his master, to exercise ordinary care for his safety, his assumption of the risks of the employment will not prevent a recovery, if he was in the exercise of ordinary care, at the time of his injury and was discharging his duties in a usual and ordinary manner.⁵² “The assumption of risk is a species of contributory negligence.”⁵³

§ 334. **Comparative negligence — Illinois rule prior to 1894.**— In the State of Illinois the rule of law, known as comparative negligence, did prevail prior to 1894, which is stated in the language of Chief Justice Breese, of the Supreme Court of Illinois, to be: “The degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff’s negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action.”⁵⁴ This

⁵⁰ Tiffany on Death by Wrongful Act, § 66; Beach on Cont. Neg. (3d ed.), § 60; Shearm. & Redf. on Neg. (5th ed.), § 65; Thomp. on Neg. 1279. For a discussion of the law of contributory negligence, as applied to beneficiaries and of parents in actions brought by them, see Tiffany on Death by Wrongful Act, §§ 69-72; Beach on Cont. Neg. (3d ed.), § 131 *et seq.* The contributory negligence of the executor or administrator is not a defense unless he is the sole beneficiary. *Indian Mfg. Co. v. Millican*, 87 Ind. 87 (1882); *Consolidated Traction Co. v. Hone*, 30 Vr. 275 (1896); 31 *id.* 444; *Wymore v. Mahaska County*, 78 Iowa, 396 (1889).

⁵¹ 9 & 10 Vict., chap. 93. See § 319.

⁵² 7 Am. & Eng. Ency. of Law (2d ed.), p. 416.

⁵³ *Greef v. Brown*, 7 Kan. App. 398 (1897). The fact that one assumes a dangerous position, or incurs a risk, is not always conclusive evidence of negligence. *Chicago & C. Ry. Co. v. Carpenter*, 12 U. S. App. 392 (1893).

⁵⁴ *Galena & C. R. R. Co. v. Jacobs*, 20 Ill. 478 (1858). Cases in the Illinois reports reviewed by the same judge in *Chicago & C. Ry. Co. v. Sweeney*, 52 Ill. 330 (1869).

rule of law was firmly established and intrenched in the law of Illinois prior to 1894; it had been repeatedly declared and applied by the Supreme Court of that State prior to 1894.⁵⁵ Chief Justice Breese first announced this rule of law, in consequence of which he is regarded as its father. In 1894 the Supreme Court of Illinois said, the doctrine of comparative negligence is no longer the law of that State.⁵⁶ The doctrine of comparative negligence in many of the States⁵⁷ has been ex-

⁵⁵ Willard v. Swanseon, 126 Ill. 381 (1888); Chicago &c. R. R. Co. v. Warner, 123 id. 38 (1887); Chicago &c. R. R. Co. v. Fietsam, id. 518 (1888); Wabash &c. Ry. Co. v. Wallace, 110 id. 114 (1884); Chicago &c. R. R. Co. v. Clark, 108 id. 113 (1883); Ohio &c. Ry. Co. v. Porter, 92 id. 437 (1879); City of Chicago v. Stearns, 105 id. 554 (1883); Chicago &c. R. R. Co. v. Johnson, 103 id. 512 (1882); Chicago &c. Ry. Co. v. Dimick, 96 id. 42 (1880); Stratton v. Central Street Ry. Co., 95 id. 25 (1880); Hayward v. Merrill, 94 id. 349 (1880); Chicago &c. R. R. Co. v. Pondrom, 51 Ill. 333 (1869). The rule is not based on a mere preponderance of negligence, but upon a comparison of the relative degrees of negligence. As was said by Mr. Justice Scholfield: "The rule of this court is, that the relative degrees of negligence, in cases of this kind, is matter of comparison, and that the plaintiff may recover, although his intestate was guilty of contributory negligence, provided the negligence of the intestate was slight and that of the defendant gross in comparison with each other; and, consequently, if the intestate's negligence was not slight, and that of the defendant gross, in comparison with each other, there can be no recovery." The defend-

ant's negligence must be great, and plaintiff's slight when compared. Chicago &c. R. R. Co. v. Dunn, 61 Ill. 385 (1871); Rockford &c. R. R. Co. v. Delaney, 82 Ill. 198 (1876); Lake Shore &c. Ry. Co. v. Johnson, 135 id. 641 (1891).

⁵⁶ Lanark v. Dougherty, 153 Ill. 163 (1894); Cicero &c. Ry. Co. v. Meixner, 160 id. 320 (1896). See on this subject, 6 Am. & Eng. Ency. of Law (2d ed.), p. 360.

⁵⁷ Alabama: Memphis &c. R. R. Co. v. Copeland, 61 Ala. 376 (1878); Gothard v. Alabama &c. R. R. Co., 67 id. 114 (1880).

Indiana: Pennsylvania Co. v. Roney, 89 Ind. 453, 455 (1883); Terre Haute &c. R. R. Co. v. Graham, 95 id. 294 (1883).

Iowa: O'Keefe v. Chicago &c. R. R. Co., 32 Iowa, 467 (1871); Johnson v. Tillson, 36 id. 89 (1872).

Kansas: Atchison &c. R. R. Co. v. Henny, 57 Kan. 154 (1896).

Kentucky: Kentucky Central Ry. Co. v. Smith, 93 Ky. 449 (1892).

Massachusetts: Marble v. Ross, 124 Mass. 44, 59 (1878).

Michigan: Matta v. Chicago &c. R. R. Co., 69 Mich. 109 (1888).

Missouri: Hurt v. St. Louis &c. Ry. Co., 94 Mo. 255 (1887).

Nebraska: City of Friend v. Burleigh, 53 Neb. 674 (1898).

New Jersey: Pennsylvania R. R. Co. v. Righter, 13 Vr. 180 (1880).

New York: Wilds v. Hudson R.

pressly repudiated. In some of the States this subject is controlled by statute.⁵⁸

§ 335. **The rule of identification or imputable negligence — Passenger and carrier.**— In 1849 the famous case of *Thorogood v. Bryan*⁵⁹ was decided in England, where it was held, that the negligence of a driver of an omnibus, a public conveyance, was *identified* with, or was to be *imputed* to, a passenger, who was killed in a collision of the omnibus. The doctrine of this case was subsequently questioned by the English courts⁶⁰ and finally overruled by the House of Lords.⁶¹ The case of *Thorogood v. Bryan* was followed by some of the courts of the United States for a time, but the doctrine of that case has been, of late years, generally repudiated and rejected in the United States with possibly two or three exceptions.⁶² The reasons for repudiating

R. Co., 24 N. Y. 430, 432 (1862); id. 181.

Pennsylvania: *Potter v. Warner*, 91 Pa. St. 362 (1879).

Tennessee: *East Tennessee &c. Ry. Co. v. Gurley*, 12 Lea, 46, 55 (1883); *East Tennessee &c. Ry. Co. v. Hull*, 88 Tenn. 33, 36 (1889); *East Tennessee &c. Ry. Co. v. Aiken*, 89 id. 245 (1890). Plaintiff's contributory negligence in actions against railroad companies is to be considered in mitigation of damages. *East Tennessee &c. R. R. Co. v. Fain*, 12 Lea, 35 (1883); *Louisville &c. Ry. Co. v. Howard*, 90 Tenn. 144 (1891).

Texas: *Houston &c. Ry. Co. v. Gorlett*, 49 Tex. 573 (1878); *Missouri &c. Ry. Co. v. Rodgers*, 89 id. 675 (1896).

Wisconsin: *Potter v. Chicago &c. R. R. Co.*, 21 Wis. 372 (1867); 22 id. 615 (1868); *Cunningham v. Lyness*, 22 id. 245 (1867). See *Beach on Cont. Neg.* (3d ed.), §§ 88, 93; *Shearm. & Redf. on Neg.* (5th ed.), §§ 102, 103; *Whart. on Neg.*, § 334; *Thomp. on Neg.* 1165.

⁵⁸ Florida: Stats. 1887, chap. 3744, § 1; *Florida Cent. &c. R. R.*

Co. v. Williams, 37 Fla. 406 (1896).

Georgia: Code Ga., §§ 2972, 3034.

There are many cases in the Georgia reports. See *Southern Ry. Co. v. Watson*, 104 Ga. 243 (1898). South Carolina: *Gen. Stats. So. Car.*, § 1529; *Petrie v. Columbia &c. R. R. Co.*, 29 So. Car. 303 (1888).

⁵⁹ 8 C. B. 115 (1849).

⁶⁰ *Tuff v. Warman*, 2 C. B. (N. S.) 750 (1857); *Waite v. Northeastern Ry. Co.*, EL, BL & EL. 728 (1858); *Armstrong v. Lancashire &c. Ry. Co.*, L. R., 10 Exch. 47 (1873).

⁶¹ *The Bernina*, L. R., 12 P. & D. 58 (1887); affirmed, L. R., 13 App. Cas. 1 (1888).

⁶² This is so in

United States courts: *Little v. Hackett*, 116 U. S. 366 (1885); *Lapsley v. Union Pacific R. R. Co.*, 50 Fed. Rep. 172, 181 (1890); affirmed, 51 id. 174 (1892).

Alabama: *Elyton Land Co. v. Mingea*, 89 Ala. 521 (1889).

the doctrine of *Thorogood v. Bryan* are stated with clearness and force by three distinguished American judges — Mr. Jus-

California: *Thompkins v. Clay Street R. R. Co.*, 66 Cal. 163 (1884).

Connecticut: See *Bartram v. Town of Sharon*, Conn. ; 6

Am. Neg. Rep. 10 (1899). In that case it was held, that one who was a gratuitous passenger in a wagon that overturned on the part of a road that was out of repair, cannot recover for the injury under General Statutes, section 2673, authorizing a recovery by any person injured "by means of a defective road" when the driver was negligent in not avoiding the defect in the road that he knew was there.

Georgia: *East Tennessee &c. Ry. Co. v. Markens*, 88 Ga. 60 (1891); *Metropolitan Street R. R. Co. v. Powell*, 89 id. 601 (1892).

Illinois: *Wabash &c. Ry. Co. v. Shacklet*, 105 Ill. 364 (1883).

Indiana: *Town of Knightstown v. Musgrove*, 116 Ind. 121 (1888); *Louisville &c. R. R. Co. v. Creek*, 130 id. 139 (1891).

Iowa: *Nesbit v. Town of Garner*, 75 Iowa, 314 (1888); *Larkin v. Burlington &c. Ry. Co.*, 85 id. 492 (1892).

Kansas: *City of Leavenworth v. Hatch*, 57 Kan. 57 (1896); *Reading Township v. Telfer*, 57 id. 798 (1897).

Kentucky: *Louisville &c. R. R. Co. v. Case*, 9 Bush, 728 (1873); *Cahill v. Cincinnati &c. Ry. Co.*, 92 Ky. 345 (1891).

Maine: *State v. Boston &c. R. R. Co.*, 80 Me. 430 (1888).

Maryland: *Philadelphia &c. R. R. Co. v. Hogeland*, 66 Md. 149 (1886).

Massachusetts: *Randolph v. O'Riordon*, 155 Mass. 331 (1892).

Michigan: *Cuddy v. Horn*, 46 Mich. 596 (1881); *Malmsten v. Marquette &c. R. R. Co.*, 49 id. 94 (1882).

Minnesota: *Flaherty v. Minneapolis &c. Ry. Co.*, 39 Minn. 328 (1888).

Mississippi: *Alabama &c. Ry. Co. v. Davis*, 69 Miss. 444 (1891).

Missouri: *Becke v. Missouri Pacific Ry. Co.*, 102 Mo. 544 (1890); *Dickson v. Missouri Pacific Ry. Co.*, 104 id. 491 (1891).

New Hampshire: *Noyes v. Boscawen*, 64 N. H. 361 (1887).

New Jersey: *Bennett v. New Jersey &c. Transp. Co.*, 7 Vr. 225 (1873); *New York &c. R. R. Co. v. Steinbrenner*, 18 id. 161 (1885).
New York: *Webster v. Hudson River R. R. Co.*, 38 N. Y. 260 (1868); *Seaman v. Koehler*, 122 id. 646 (1890).

North Dakota: *Ouverson v. City of Grafton*, 5 No. Dak. 281 (1895).

Ohio: *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86 (1880); *St. Clair Street Ry. Co. v. Eadie*, 43 id. 91 (1885); *New York &c. R. R. Co. v. Kistler*, 16 Ohio C. C. 316 (1894).

Pennsylvania: *Bunting v. Hogsett*, 139 Pa. St. 363 (1891); *Borough of Carlisle v. Brisbane*, 113 id. 544 (1886); *Dean v. Pennsylvania R. R. Co.*, 129 id. 514 (1889), overruling *Lockhart v. Lichtenhaler*, 46 Pa. St. 151 (1863); *Philadelphia &c. R. R. Co. v. Boyer*, 97 id. 91 (1881).

Texas: *Galveston &c. Ry. Co. v. Kutac*, 72 Tex. 643 (1889). Negligence of host or his servant be imputed to the guest. *Markham v. Houston &c. Nav. Co.*, 73 id. 247 (1889).

tice Field, of the United States Supreme Court,⁶³ Chief Justice Beasley, of the Supreme Court of New Jersey,⁶⁴ and Mr. Justice Mulkey, of the Supreme Court of Illinois.⁶⁵ In Wisconsin, it was held, that the contributory negligence of the driver of a *private* conveyance is imputed to one voluntarily riding therein, and will defeat a recovery by the person so riding.⁶⁶

§ 336. **Applications of the rule.**—The principle that the negligence of the driver will not be imputed to the passenger, has no application to those cases where, in fact, the passenger is himself negligent as well as the driver.⁶⁷ Thus, it is stated by the New York Court of Appeals, that the rule that the negligence of the driver of a vehicle may not be imputed to a passenger, in an action to recover damages for injuries alleged to have been occasioned by the defendant's negligence, is only ap-

Virginia: *New York &c. R. R. Ry. Co.*, 43 Wis. 513 (1878); *Otis Co. v. Cooper*, 85 Va. 939 (1889); *v. Town of Janesville*, 47 id. 422 (1879); *Ritger v. City of Milwaukee*, 99 id. 190 (1898). These cases were followed in

⁶³ *Little v. Hackett*, 116 U. S. 366 (1885).

⁶⁴ *Bennett v. New Jersey &c. Co.*, 7 Vr. 225 (1873); approved, *New York &c. R. R. Co. v. Steinbrenner*, 18 id. 161, 168 (1885).

⁶⁵ *Wabash &c. Ry. Co. v. Shacklet*, 105 Ill. 364 (1883); reviewed by Clark, J., in *Noyes v. Boscawen*, 64 N. H. 361 (1887). The general rule in the United States is opposed to *Thorogood v. Bryan*. Mr. Beach, in his work on *Contributory Negligence*, states, that, "It is the general American rule that there is no privity in negligence between passenger and carrier, and that, therefore, when the passenger brings an action of negligence, the contributory negligence of his carrier is not to be imputed to him, in any degree, for the purpose of barring his recovery." Beach on *Cont. Neg.* (3d ed.), § 110.

⁶⁶ *Prideaux v. Burlington &c.*

Montana: *Whittaker v. City of Helena*, 14 Mont. 124 (1894).

Nebraska: *Omaha &c. Ry. Co. v. Talbot*, 48 Neb. 627 (1896). The doctrine of these cases has been expressly repudiated in *Pennsylvania. Borough of Carlisle v. Brisbane*, 113 Pa. St. 544 (1886); *Mann v. Weiland*, 81½ id. 243 (1875). See 7 Am. & Eng. Ency. of Law (2d ed.), p. 447. The doctrine of imputed negligence has been applied in cases of damage to goods. *Vanderplank v. Miller*, 1 Moody & M. 169 (1828); *Simpson v. Hand*, 6 Wheat. 311 (1840, Pa.); *Duggins v. Watson*, 15 Ark. 118 (1854); *Beach on Cont. Neg.* (3d ed.), §§ 113, 114.

⁶⁷ *Pennsylvania R. R. Co. v. Righter*, 13 Vr. 180 (1880); *East Tennessee &c. Ry. Co. v. Markens*, 88 Ga. 63 (1891); *Atlantic &c. R. R. Co. v. Ironmonger*, 95 Va. 625 (1898).

plicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver, or is separated from him by an inclosure and is without opportunity to discover danger and to inform the driver of it. It is no less the duty of the passenger, where he has an opportunity to do so, than of the driver, to learn of the danger and to avoid it, if practicable.⁶⁸ If the occupant willingly joins the driver in driving over a place, obviously dangerous and is injured, he will be guilty of contributory negligence and cannot recover;⁶⁹ or a failure by the passenger to listen and look while approaching a well-known railroad crossing, at a fast trot, without keeping any lookout and without any request to the driver to stop;⁷⁰ or if the plaintiff, while riding in a wagon, is conscious of the danger and risk assumed by the driver, and makes no objection or effort to avoid it, he will be charged with contributory negligence.⁷¹ Unless the passenger has some reason to distrust the diligence of the driver, he is under no duty to supervise the driver, at a railroad crossing, nor to look or listen for approaching trains.⁷² But the degree of care to be exercised by the passenger, varies with the circumstances of each case and is, generally, a question of fact for the jury.⁷³

§ 337. The rule applied to husband and wife — Conflicting decisions.— The question whether the husband's contributory negligence is to be imputed to the wife, so as to bar the wife's

⁶⁸ *Brickell v. New York &c. R. R. Co.*, 120 N. Y. 290 (1890); *Pennsylvania R. R. Co. v. Richter*, 13 Vr. 180 (1880); *Larkin v. Burlington &c. Ry. Co.*, 85 Iowa, 492 (1892); *Cahill v. Cincinnati &c. Ry. Co.*, 92 Ky. 345 (1891).

⁶⁹ *Township of Crescent v. Anderson*, 114 Pa. St. 643 (1886).

⁷⁰ *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514 (1889). Or riding with an intoxicated driver who recklessly drove across a railroad track. *Smith v. New York &c. R. R. Co.*, 38 Hun, 33 (1886).

⁷¹ *Donnelly v. Brooklyn City R. R. Co.*, 109 N. Y. 16 (1888); *Bran-*

nen v. Kokomo &c. R. R. Co., 115 Ind. 115 (1888); *Miller v. Louisville &c. Ry. Co.*, 128 id. 97 (1890); *Griffith v. Baltimore &c. R. R. Co.*, 44 Fed. Rep. 574 (1890).

⁷² *East Tennessee &c. Ry. Co. v. Markens*, 88 Ga. 60 (1891); *McCallum v. Long Island R. R. Co.*, 38 Hun, 569 (1886).

⁷³ *Hoag v. New York &c. R. R. Co.*, 111 N. Y. 199 (1888). Going in a boat under the charge of an able-bodied blind man is not *per se* conclusive proof of negligence. *Harris v. Uebelhoer*, 75 N. Y. 169 (1878).

right of recovery, for her personal injuries, when she is free from negligence, although sitting by his side in a wagon driven by him, has been decided both ways in the United States. The courts which hold, that the husband's contributory negligence is to be imputed to the wife, base it upon the ground of the common-law rule, of the wife's disability to maintain an action separately from her husband, and the husband's legal interest in the wife's cause of action. At best, the principle of imputed negligence, is a fiction of law which finds small favor with the courts. The conclusion, that the contributory negligence of the husband, while in company with his wife, will not bar the wife from recovering, for her personal injuries, when she is free from fault, is supported by the stronger reasons.⁷⁴ The

⁷⁴ United States: *Sheffield v. Central Union Tel. Co.*, 36 Fed. Rep. 164 (1888); *Shaw v. Craft*, 37 id. 317 (1888); *Honey v. Chicago &c. Ry. Co.*, 59 id. 423 (1893). In some of the States the husband's contributory negligence has been held to be a bar to the wife's recovery:

California: *McFadden v. Santa Ana &c. Ry. Co.*, 87 Cal. 464 (1891).
 Connecticut: *Peck v. New York &c. R. R. Co.*, 50 Conn. 379 (1882).

Indiana: *Louisville &c. Ry. Co. v. Creek*, 130 Ind. 139 (1891); *Chicago &c. R. R. Co. v. Spilker*, 134 id. 380 (1892). Illinois: *Toledo &c. R. R. Co. v. Crittenden*, 42 Ill. App. 469 (1891); *City of Rock Island v. Vanland-schoot*, 78 Ill. 485 (1875).

Kansas: When the husband is not under the wife's control. *Reading Township v. Telfer*, 57 Kan. 798 (1897). Iowa: *Yahn v. City of Ottumwa*, 60 Iowa, 429 (1883).

Minnesota: *Finley v. Chicago &c. Ry. Co.*, 71 Minn. 471 (1898). New Jersey: *Pennsylvania R. R. Co. v. Goodenough*, 26 Vr. 577 (1893). In that case Mr. Justice Dixon delivered a strong dissenting opinion, in which he denies the premises on which the opposite conclusion is based.

New York: *Hoag v. New York Central &c. R. R. Co.*, 111 N. Y. 199 (1888); *Platz v. City of Cohoes*, 24 Hun, 101 (1881); affirmed, 89 N. Y. 219; *Hennessy v. Brooklyn City R. R. Co.*, 73 Hun, 569 (1893). Ohio: *Davis v. Guarnieri*, 45 Ohio St. 470 (1887). In that case the cases are reviewed by Chief Justice Owen, p. 487.

Missouri: *Flori v. City of St. Louis*, 3 Mo. App. 231 (1877); *Hedges v. City of Kansas*, 18 id. 62 (1885). Pennsylvania: *Borough of Nanticoke v. Warne*, 106 Pa. St. 373 (1884).

Texas: *Galveston &c. R. R. Co. v. Kutac*, 76 Tex. 473 (1890). Vermont: *Carlisle v. Town of Sheldon*, 38 Vt. 440 (1866).

Virginia: See *Atlantic &c. R. R. Co. v. Ironmonger*, 95 Va. 625 (1898).

wife's contributory negligence will be a bar to the husband's action to recover damages for his loss growing out of the injuries to his wife,⁷⁵ and, of course, the wife's contributory negligence will bar her right.⁷⁶

§ 338. **The rule applied to parent and child — Conflicting decisions.**—The rule of imputed negligence, has been applied in some States, to cases of parent and child, *i. e.*, the negligence of the parent or guardian, has been imputed to the child, in actions brought to recover damages for injuries to young children, as a defense to the action, when the suit is by the infant in his own right. These decisions are based either upon the ground of agency, which is supposed to exist between the parent and child, or on the ground, that the child is identified with the parent, so as to constitute a defense.⁷⁷ The case of *Hartfield v. Roper*, 21 Wend. 615, decided by Judge Cowen, in the New

⁷⁵ Such as loss of service. *Winer v. Oakland Township*, 158 Pa. St. 405 (1893). *Contra*, in a State where she had been relieved of all common-law disabilities and he of all responsibility for her torts. Suit by husband to recover for medical expenses, loss of society and of aid in household affairs. *Honey v. Chicago &c. Ry. Co.*, 59 Fed. Rep. 423 (1893).

⁷⁶ *Finley v. Chicago &c. Ry. Co.*, 71 Minn. 471 (1898).

⁷⁷ This is so in

England: *Waite v. Northeastern Ry. Co.*, El. Bl. & El. 719 (1858).

California: *Meeks v. Southern Pacific R. R. Co.*, 52 Cal. 602 (1878); 56 id. 513 (1880); *Higgins v. Deeney*, 78 id. 578 (1889); *Daly v. Hinz*, 113 id. 366 (1896).

Delaware: *Kyne v. Wilmington &c. R. R. Co.*, 8 Houst. 185 (Del. 1888).

Indiana: *Pittsburgh &c. Ry. Co. v. Vining*, 27 Ind. 513 (1867); *Hathaway v. Toledo &c. Ry. Co.*, 46 id. 25 (1874); *Evansville &c. R. R. Co. v. Wolf*, 59 id. 89 (1877). *Contra*,

City of Evansville v. Senhenn, 151 Ind. 42 (1898).

Kansas: *Smith v. Atchison &c. R. R. Co.*, 25 Kan. 738 (1881); *Atchison &c. R. R. Co. v. Smith*, 28 id. 541 (1882).

Maine: *Brown v. European &c. Ry. Co.*, 58 Me. 384 (1870); *Leslie v. City of Lewiston*, 62 id. 468 (1873); *O'Brien v. McGlinchy*, 68 id. 552 (1878).

Maryland: *McMahon v. Northern &c. Ry. Co.*, 39 Md. 439 (1873); *Baltimore &c. Ry. Co. v. McDonnell*, 43 id. 534 (1875).

Massachusetts: *Wright v. Malden &c. R. R. Co.*, 4 Allen, 283 (1862); *Callahan v. Bean*, 9 id. 401 (1864); *Holly v. Boston Gas Light Co.*, 8 Gray, 123 (1857); *Lynch v. Smith*, 104 Mass. 52 (1870); *McGerry v. Eastern R. R. Co.*, 135 id. 303 (1883); *Casey v. Smith*, 152 id. 294 (1890).

Minnesota: *Fitzgerald v. St. Paul &c. Ry. Co.*, 29 Minn. 336 (1882).

New York: *Hartfield v. Roper*, 21 Wend. 615 (1839); *Morrison v.*

York Supreme Court in 1839, is the parent case on this point. But this doctrine of imputing the negligence of a parent to a child, like the parent case of *Thorogood v. Bryan*, has been repudiated in almost all of the States.⁷⁸ The untenable ground

Erie R. R. Co., 56 N. Y. 302 (1874); *Thurber v. Harlem &c. R. R. Co.*, 60 id. 326, 333 (1875); *McGarry v. Loomis*, 63 id. 104 (1874). This is known as the New York rule. See further on this point *Shearm. & Redf. on Neg.* (5th ed.), §§ 74, 75. Nebraska: *Huff v. Ames*, 16 Neb. 139 (1884). New Hampshire: *Bisaillon v. Blood*, 64 N. H. 565 (1888). New Jersey: *Newman v. Phillipsburg R. R. Co.*, 23 Vr. 446 (1890).

⁷⁸ This is so in

United States courts: *Chicago &c. Ry. Co. v. Kowalski*, 92 Fed. Rep. 310 (1899).

Alabama: *Government Street R. R. Co. v. Hanlon*, 53 Ala. 70 (1875); *Pratt Coal &c. Co. v. Brawley*, 83 id. 371 (1887).

Connecticut: *Daley v. Norwich &c. R. R. Co.*, 26 Conn. 591 (1858).

Georgia: *Ferguson v. Columbus &c. Ry. Co.*, 77 Ga. 102 (1886).

Illinois: Cases reviewed by Mr. Justice Bailey: *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370 (1891); *Daube v. Tennison*, 154 id. 210 (1895); *Metropolitan &c. R. R. Co. v. Kersey*, 80 Ill. App. 301 (1898).

Indiana: *City of Evansville v. Senhenn*, 151 Ind. 42 (1898).

Iowa: Cases reviewed by Robinson, J., in *Wymore v. Mahaska County*, 78 Iowa, 396 (1889).

Louisiana: *Westerfield v. Levis*, 43 La. Ann. 63 (1891).

Michigan: *Power v. Harlow*, 57 Mich. 107 (1885); *Schindler v. Milwaukee &c. Ry. Co.*, 87 id. 400 (1891).

Mississippi: *Westbrook v. Mobile &c. R. R. Co.*, 66 Miss. 560 (1889).

Missouri: *Stillson v. Hannibal &c. R. R. Co.*, 67 Mo. 671 (1878); *Winters v. Kansas City &c. Ry. Co.*, 99 id. 509 (1889).

Ohio: *Bellefontaine &c. R. R. Co. v. Snyder*, 18 Ohio St. 399 (1868); *Cleveland &c. R. R. Co. v. Manson*, 30 id. 451 (1876).

Pennsylvania: *Smith v. O'Connor*, 48 Pa. St. 218 (1864); *North Pa. R. R. Co. v. Mahoney*, 57 id. 187 (1868); *Kay v. Pennsylvania R. R. Co.*, 65 id. 269, 276 (1870); *Philadelphia &c. R. R. Co. v. Long*, 75 id. 257 (1874); *Erie City Pass. Ry. Co. v. Schuster*, 113 id. 412 (1886).

Tennessee: *Whirley v. Whiteman*, 1 Head, 610 (1858); *Bamberger v. Citizens Street Ry. Co.*, 95 Tenn. 18 (1895).

Texas: *Texas &c. Ry. Co. v. O'Donnell*, 58 Tex. 27 (1882); *Galveston &c. Ry. Co. v. Moore*, 59 id. 64 (1883); *Western Union Tel. Co. v. Hoffman*, 80 id. 420 (1891).

Vermont: *Robinson v. Cone*, 22 Vt. 213 (1850); *Ploof v. Burlington Traction Co.*, 70 id. 509 (1898).

Virginia: *Norfolk &c. R. R. Co. v. Ormsby*, 27 Gratt. 455 (1876); *Norfolk &c. R. R. Co. v. Groseclose*, 88 Va. 267 (1891). See *Whart. on Neg.*, § 310; *Shearm. & Redf. on Neg.* (5th ed.), §§ 74, 78; *Beach on Cont. Neg.* (3d ed.), § 116 *et seq.*; 7 *Am. & Eng. Ency. of Law* (2d ed.), p. 448.

on which the parent case of *Hartfield v. Roper*, 21 Wend. 615, and those which followed it, rest, has been pointed out by Mr. Chief Justice Beasley, of the New Jersey Supreme Court, in the following language: "The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being, that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice, nor hardship, in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance."⁷⁹ When the action for the negligent injury of an infant is brought by the parent, or for the parent's own benefit, the contributory negligence of such parent may be shown in bar of the action.⁸⁰ So, negligence of a parent, contributing proximately to the death of an infant child, or like negligence of the parent's agent and custodian of the child, will defeat a recovery by the parent for such death of the child, when such parent is the sole beneficiary of the action.⁸¹ In New Jersey, it was held by the Supreme Court of that State, that when a father sues as the administrator and the sole next of kin of his deceased minor son, the fact that the death was in part occasioned by the contributory carelessness of the father cannot be set up in defense of the action.⁸² In actions by the parent, the child's contribu-

⁷⁹ *Newman v. Phillipsburg R. R. Co.*, 23 Vr. 446 (1890).

⁸⁰ *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370 (1891); *Beach on Cont. Neg.* (3d ed.), § 131, and cases cited; *Shearm. & Redf. on Neg.* (5th ed.), § 71; *Alabama &c. R. R. Co. v. Burgess*, 116 Ala. 509 (1897); *Pratt Coal &c. Co. v. Brawley*, 83 id. 371 (1887); *Westbrook v. Mobile &c. R. R. Co.*, 66 Miss. 560 (1889); *Ploof v. Burlington Traction Co.*, 70 Vt. 509 (1898).

⁸¹ *Bamberger v. Citizens Street Ry. Co.*, 95 Tenn. 18 (1895).

⁸² *Consolidated Traction Co. v. Hone*, 30 Vr. 275 (1896). On appeal the Court of Errors and Appeals was equally divided on this point. 31 Vr. 444 (1897); *Wymore v. Mahaska County*, 78 Iowa, 396 (1889). What acts and omissions on the part of parents have been held to be contributory negligence. See for a collection of cases, *Beach on Cont. Neg.* (3d ed.), § 142. The parent must be actually in fault, in order to bar his recovery on the ground of his contributory fault. *Shearm. &*

tory negligence will be a defense,⁸³ unless such child be within the age which raises a legal presumption of incapacity.⁸⁴

§ 339. Care exacted from children — Contributory negligence — Question of fact. — A child is required by law to exercise care for his own safety, but he is required to exercise only such degree of care as would naturally and reasonably be expected of a person of his age, capacity, experience and knowledge.⁸⁵ The test of a child's contributory negligence is his age, intelligence, ability to know his surroundings and the danger of what he was doing.⁸⁶ The standard of care exacted from a child varies with his age and capacity. The question of a child's capacity is one of fact for the jury and not one of law for the court to decide.⁸⁷ The care and caution exacted from a child,

Redf. on Neg. (5th ed.), § 72. It is not negligence, as a matter of law, for the parents of a bright child, four and a half years old, living in a crowded locality in a city, with no other place for amusement, to permit the child, with proper instructions and directions against going into the street, to play upon the sidewalk without an attendant. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504 (1888).

⁸³ Beach on Cont. Neg. (3d ed.), § 132, and cases cited.

⁸⁴ *Pratt Coal & Co. v. Brawley*, 83 Ala. 371 (1887).

⁸⁵ There are many reported cases in which this rule is stated. See *Thomas on Neg.*, p. 383; *Shearm. & Redf. on Neg.* (5th ed.), § 73; *Beach on Cont. Neg.* (3d ed.), § 136; 7 *Am. & Eng. Ency. of Law* (2d ed.), pp. 405-410; *Van Natta v. Peoples Street Ry. Co.*, 133 Mo. 13 (1895); *Baltimore & C. R. R. Co. v. Cumberland*, 12 App. Cas. (D. C.) 598 (1898); *Kentucky Central Ry. Co. v. Smith*, 93 Ky. 449 (1892); *Huff v. Ames*, 16 Neb. 139 (1884);

Railroad Co. v. Stout, 17 Wall. 657 (1873); *Western & C. R. R. Co. v. Rogers*, 104 Ga. 224 (1898).

⁸⁶ *Bridger v. Asheville & C. R. R. Co.*, 27 So. Car. 456 (1887); *Achtengagen v. City of Watertown*, 18 Wis. 331 (1864); *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370 (1891). "It is that degree of care which could reasonably be expected from a boy of his age and capacity." *Plumley v. Birge*, 124 Mass. 57 (1878). The degree of care required of an infant of tender years, the omission of which will constitute negligence on his part, is entirely different from that required of an adult. *Thurber v. Harlem & C. R. R. Co.*, 60 N. Y. 326 (1875); *Washington & C. R. R. Co. v. Gladmon*, 15 Wall. 401 (1872). The measure of care required in such a case is simply such as might reasonably be expected, under the circumstances, of a child of that age. *Stone v. Dry Dock & C. R. R. Co.*, 115 N. Y. 104 (1889).

⁸⁷ *Westbrook v. Mobile & C. R. R. Co.*, 66 Miss. 560 (1889).

is largely to be determined in each case, by the circumstances of that case.⁸⁸ It is a question of fact for the jury.⁸⁹

§ 340. **Presumptions from age.**—A child over fourteen years of age is presumed to be capable of using some degree of care for his own protection.⁹⁰ A child between seven and fourteen years of age is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity.⁹¹ A child under seven years of age is presumed to be incapable of contributory negligence.⁹² Children so young as to be *non sui juris* cannot be guilty of contributory negligence.⁹³

§ 341. **The two opposing rules stated by Mr. Justice Bailey.**—“The application of the doctrine of contributory negligence to the conduct of young children is a difficult one, and very naturally had led to considerable difference of opinion. The two opposing views most commonly met with are, first, that up to a

⁸⁸ *Washington &c. R. R. Co. v. Gladmon*, 15 Wall. 401 (1872).

⁸⁹ *Stone v. Dry Dock &c. R. R. Co.*, 115 N. Y. 104 (1889); *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370 (1891); *Houston &c. Ry. Co. v. Simpson*, 60 Tex. 103 (1883); *Western Union Tel. Co. v. Hoffman*, 80 id. 420 (1891); 7 Am. & Eng. Ency. of Law (2d ed.), p. 408. When the child is not wholly irresponsible. *Ib.* “Unless the child is exceedingly young it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid danger, the court will decide it as a matter of law. Thus, courts have held, as a matter of law, children of various ages from one year and five months to seven years *non sui juris*.” *Beach on Cont. Neg.* (3d ed.), § 117, and cases cited.

⁹⁰ See *Pratt Coal &c. Co. v. Brawley*, 83 Ala. 371 (1887).

⁹¹ *Pratt Coal &c. Co. v. Brawley*, 83 Ala. 371, 374 (1887); *Westbrook v. Mobile &c. R. R. Co.*, 66 Miss. 560 (1889).

⁹² *Westbrook v. Mobile &c. R. R. Co.*, 66 Miss. 560 (1889); *Stone v. Dry Dock &c. R. R. Co.*, 115 N. Y. 104 (1889); *Westerfield v. Levis*, 43 La. Ann. 63 (1891). For a collection of many cases in which the principle of contributory negligence has been discussed and applied to children, see *Shearm. & Redf. on Neg.* (5th ed.), §§ 73, 73a.

⁹³ 7 Am. & Eng. Ency. of Law (2d ed.), p. 410; *Chicago &c. Ry. Co. v. Ryan*, 131 Ill. 474 (1890); *North Kankakee Street Ry. Co. v. Blatchford*, 81 Ill. App. 609 (1898); *Crawford v. Southern Ry. Co.*, Ga. ; 33 South E. Rep. 826 (1899).

certain age, the precise limit of which is not and, perhaps, cannot be well defined, a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law. The rule thus contended for is sometimes said to be analogous to the rule of the common law, which exempts children under seven years of age from criminal responsibility. The other view is, that young children are bound to use such care and such care only as is usually exercised by children of the same age and degree of intelligence, and that it is always, therefore, a question of fact to be determined by the jury whether, in a given case, the child is in the exercise of proper care, his tender years, his intelligence, or the want of it, and all the circumstances by which he was surrounded being taken into account. Under this rule, as is claimed, it can never be laid down, as a matter of law, that any child, however young, is incapable of contributory negligence, it being always a question of fact for the jury."⁹⁴

§ 342. Care exacted from idiots — Lunatics — Contributory negligence.— The same rules apply to cases, when idiots, lunatics or weak-minded persons are in question, as children, except the appearance, as in case of children, is a warning that they are not to be held to the adult standard of ordinary care.⁹⁵ They must use such care for their safety as prudent persons of that class use.⁹⁶

§ 343. Care exacted from persons physically infirm — Contributory negligence.— Physical infirmities, such as deafness, and blindness, are not an excuse or defense for a failure to exercise ordinary care which prudent persons would observe under the circumstances;⁹⁷ in fact, such persons should exercise greater

⁹⁴ Bailey, J., in *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370, 382 (1891).

⁹⁵ Shearm. & Redf. on Neg. (5th ed.), § 84; Deering on Neg., § 20; Thomp. on Neg. 1129.

⁹⁶ *Winn v. City of Lowell*, 1 Allen, 177 (1861); *City of Centralia v. Kruse*, 64 Ill. 19 (1872); *Maloy v. Wabash &c. Ry. Co.*, 84 Mo. 270 (1884).

⁹⁷ Beach on Cont. Neg. (3d ed.), §§ 396, 397; 7 Am. & Eng. Ency. of Law (2d ed.), p. 442; Thomas on Neg., p. 380; *Candee v. Kansas City &c. Ry. Co.*, 130 Mo. 142 (1895); *Ormsbee v. Boston &c. R. Co.*, 14 R. I. 102 (1883); *Cleveland &c. R. R. Co. v. Tenny*, 8 Ohio St. 570 (1858); *Birmingham Ry. &c. Co. v. Bowers*, 110 Ala. 328 (1895); *Johnson v. Louisville &c. R. R.*

care.⁹⁸ Greater care, caution and prudence are required of a deaf-mute, who goes on a railroad track, than of one in the full possession of all his senses.⁹⁹ Deafness is no excuse at a railroad crossing; it should rather add a spur to the plaintiff's vigilance and prompt him to employ his other faculties so as to compensate, so far as possible, for the lacking one;¹ so of a blind person on a street,² or at a railroad crossing.³

§ 344. *Intoxication as an element.*—Intoxication on the part of the injured person does not *per se* establish contributory negligence,⁴ but it is a circumstance that may be considered as bearing upon the question of plaintiff's due care.⁵ Intoxication is not a defense unless it was the proximate cause of the injury,⁶ because a drunken man is not beyond the protection of the law; he is not an outcast;⁷ but if plaintiff's intoxication contrib-

Co., 91 Ky. 651 (1891); Atlanta Consolidated Street Ry. Co. v. Bates, 103 Ga. 333 (1897).

⁹⁸ Galveston &c. Ry. Co. v. Ryan, 80 Tex. 59 (1891); Stewart v. City of Nashville, 96 Tenn. 50 (1895); Paul v. St. Louis &c. Ry. Co., 72 Mo. 168 (1880).

⁹⁹ Schexnaydre v. Texas &c. Ry. Co., 46 La. Ann. 248 (1894).

¹ Paul v. St. Louis &c. Ry. Co., 72 Mo. 168 (1880).

² Stewart v. City of Nashville, 96 Tenn. 50 (1895). Or one of poor sight. Winn v. City of Lowell, 1 Allen. 177 (1861).

³ Florida Central &c. R. R. Co. v. Williams, 37 Fla. 406 (1896); McKinney v. Chicago &c. Ry. Co., 87 Wis. 282 (1894); Marks v. Petersburg &c. R. R. Co., 88 Va. 1 (1891).

⁴ Baltimore &c. R. R. Co. v. Chambers, 81 Md. 371 (1895). Is a circumstance, not conclusive, nor does it shift the burden of proof. Seymer v. Town of Lake, 66 Wis. 651 (1886). It may show want of ordinary care. Thorp v. Town of Brookfield, 36 Conn. 320 (1870).

Immaterial whether the traveller was or was not drunk at the time, if his drunkenness in no way contributed to the accident. Ward v. Chicago &c. Ry. Co., 85 Wis. 601 (1893); Houston &c. Ry. Co. v. Reason, 61 Tex. 613 (1884).

⁵ 7 Am. & Eng. Ency. of Law (2d ed.), p. 441; City of Aurora v. Hillman, 90 Ill. 61 (1878); Fitzgerald v. Town of Weston, 52 Wis. 354 (1881); Alger v. City of Lowell, 3 Allen, 402 (1862); Tompkins v. City of Oswego, 15 N. Y. Supp. 370 (1891); Seymer v. Town of Lake, 66 Wis. 651 (1886). By the jury. Thorp v. Town of Brookfield, 36 Conn. 320 (1870).

⁶ Davis v. Oregon &c. R. R. Co., 8 Or. 172 (1879); Cassidy v. Town of Stockbridge, 21 Vt. 391 (1849); Fitzgerald v. Town of Weston, 52 Wis. 354 (1881).

⁷ Cincinnati &c. R. R. Co. v. Cooper, 120 Ind. 473 (1889). Where a passenger is injured while intoxicated, the injury being due, not to his intoxication, but to the carrier's wrongful act, the carrier will not be relieved from liability.

uted to the injury, he cannot recover,⁸ because the plaintiff's intoxication is no excuse for his own negligence.⁹

§ 345. Sudden danger created by defendant — By plaintiff.—

A person suddenly confronted with an unexpected or sudden peril, is not chargeable with contributory negligence, if he omits some precautions, that a prudent person would otherwise take for his safety,¹⁰ especially if the sudden danger has been created by the defendant.¹¹ Where a person is involuntarily, through the fault or negligence of the defendant, placed in a situation of apparent peril to life or limb, and by reason thereof is confronted with sudden danger, then the law does not require of him, the same degree of care and caution, that it does of a person who has ample opportunity for the full exercise of his judgment and reasoning faculties.¹² When, by the negligence of another, a person is threatened with danger, and he attempts to escape such threatened danger by an act not culpable in itself, under the circumstances, the person guilty of the negligence, is liable for the injury received in such attempt to escape, even though no injury would have been sustained, had there

⁸ *Chicago &c. R. R. Co. v. Bell, Co.*, 132 Ind. 199 (1892); *Lincoln Rapid Transit Co. v. Nichols*, 37 Ill. 102 (1873); *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239 (1874); *Illinois &c. R. R. Co. v. Cragin*, 71 Ill. 177 (1873); *Strand v. Chicago &c. Ry. Co.*, 67 Mich. 380 (1887); *Alger v. City of Lowell*, 3 Allen, 402 (1862).

⁹ *Illinois Central R. R. Co. v. Hutchinson*, 47 Ill. 408 (1868); *Cincinnati &c. R. R. Co. v. Cooper*, 120 Ind. 473 (1889).

¹⁰ *Pennsylvania R. R. Co. v. Werner*, 89 Pa. St. 59 (1879); *Richmond &c. R. R. Co. v. Farmer*, 97 Ala. 141 (1893); *Connelly v. Trenton Pass. Ry. Co.*, 27 Vr. 700 (1894); *Dickson v. Omaha &c. R. R. Co.*, 124 Mo. 140 (1894); *Karr v. Parks*, 40 Cal. 188 (1870).

¹¹ *Voak v. Northern Central Ry. Co.*, 75 N. Y. 320 (1878); *Richmond &c. R. R. Co. v. Farmer*, 97 Ala. 141 (1893); *Clarke v. Pennsylvania*

¹² *Dunham Towing &c. Co. v. Dandelin*, 143 Ill. 409 (1892). "The test of contributory negligence, where the passenger is injured in endeavoring to escape the peril in which the negligence of the carrier has placed him, is, was the attempt an unreasonable, precipitate or rash act, or was it an act which a person of ordinary prudence might do? This is not determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made." *Gilfillan, C. J.*, in *Wilson v. Northern Pacific R. R. Co.*, 27 Minn. 278, 284 (1879).

been no attempt to escape the threatened danger.¹³ As stated by Lord Ellenborough, "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences;"¹⁴ but if he takes the risk simply to avoid inconvenience, he will be chargeable with contributory negligence.¹⁵ An error of judgment, in one suddenly placed in peril by his own fault, does not relieve him from the consequences of the negligence which caused such position.¹⁶

§ 346. **Trespass as an element.**—The effect of a technical trespass upon the question of plaintiff's contributory negligence has been discussed in many cases and by text-writers.¹⁷ The general rule deducible therefrom, is that a technical trespass is not a bar to plaintiff's recovery, but only a circumstance tending to prove contributory negligence on the part of the plaintiff.

§ 347. **Violation of a statute or an ordinance as an element.**—The fact that the plaintiff was acting in violation of a statute or an ordinance, at the time of the injury, will not preclude him from recovering damages therefor, unless such violation of the statute or ordinance contributed to the plaintiff's injury.¹⁸

¹³ *Brown v. Chicago &c. Ry. Co.*, 54 Wis. 342, 358 (1882).

¹⁴ *Jones v. Boyce*, 1 Stark. 493 (1816).

¹⁵ *Solomon v. Manhattan Ry. Co.*, 103 N. Y. 437, 443 (1886).

¹⁶ *Baltzer v. Chicago &c. R. R. Co.*, 83 Wis. 459 (1892); *Reary v. Louisville &c. Ry. Co.*, 40 La. Ann. 32 (1888); *Briscoe v. Southern Ry. Co.*, 103 Ga. 224 (1897).

¹⁷ *Shearm. & Redf. on Neg.* (5th ed.), §§ 97, 98; *Beach on Cont. Neg.* (3d ed.), § 216, *et seq.* A mere trespass is not contributory negligence, *per se*. 7 Am. & Eng. Ency. of Law (2d ed.), p. 402; *Daley v. Norwich &c. R. R. Co.*, 26 Conn. 591 (1858). A trespasser is not beyond the pale of the law. *Herrick v. Wixom*, Mich. ; 80 North W. Rep. 117 (1899).

¹⁸ Standing on the platform of a street car in violation of municipal ordinance. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104 (1889). Driving cattle to market on Sunday in violation of a statute. *Sutton v. Town of Wauwatosa*, 29 Wis. 21 (1871). Driving on the wrong side of the road. *Atlanta Street R. R. Co. v. Walker*, 93 Ga. 462 (1893); *Quinn v. O'Keeffe*, 41 N. Y. Supp. 116 (1896); 9 App. Div. 68. Two carriages passing each other on the highway in violation of a statute. *Damon v. Inhabitants of Scituate*, 119 Mass. 66 (1875). One injured while violating a city ordinance. *Newcomb v. Boston Prot. Dept.*, 146 Mass. 596 (1888). Driving in violation of a city ordinance. *McGrath v. City &c. Ry. Co.*, 93 Ga. 312 (1893).

§ 348. **Danger incurred to preserve life — Question for the jury.**— “The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.”¹⁹ One voluntarily exposing himself to peril, attempting to save the life of another, in danger, is not necessarily guilty of contributory negligence — the question of contributory negligence is for the jury.²⁰ Thus, an engineer, facing danger to save passengers, is not guilty of contributory negligence,²¹ unless the act was so rash as to entail certain injury, in the judgment of prudent persons.²²

§ 349. **Knowledge of defects in streets, roads, etc. — Question of fact.**— “Where a person knows of a defective and dangerous place or appliance, he must (1) use the care that a person of ordinary prudence would employ in attempting to use such place or appliance at all; (2) if he does use it, he must exercise the reasonable care demanded by the circumstances.”²³ It is not contributory negligence *per se* to use a highway, street or bridge that is known to be defective,²⁴ unless the danger was so apparent, that in the use of ordinary care, one ought not to have undertaken the passage.²⁵ Any want of ordinary care on the part of the traveller, which contributes proximately to

Horses standing in street in violation of a city ordinance. *Klipper v. Coffey*, 44 Md. 117 (1875). Driving on a street in violation of a city ordinance. *Broschart v. Tuttle*, 59 Conn. 1 (1890).

¹⁹ *Grover, J.*, in *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502, 506 (1871); quoted with approval in *Linnehan v. Sampson*, 126 Mass. 511 (1879); *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 323 (1891); *S. P., Louisville & C. R. R. Co. v. Orr*, Ala. ; 26 So. Rep. 35 (1899).

²⁰ *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502 (1871); *Condiff v. Kansas City & C. R. R. Co.*, 45 Kan. 256 (1891); *Linnehan v. Sampson*, 126 Mass. 506 (1879).

Father attempting to save child from drowning. *Gibney v. State*, 137 N. Y. 1 (1893).

²¹ *Pennsylvania Co. v. Roney*, 89 Ind. 453 (1883).

²² *Condiff v. Kansas City & C. R. R. Co.*, 45 Kan. 256 (1891); *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316 (1891); *Louisville & C. R. R. Co. v. Orr*, Ala. ; 26 So. Rep. 35 (1899).

²³ *Thomas on Neg.*, p. 372.

²⁴ 7 Am. & Eng. Ency. of Law (2d ed.), p. 411; *Beach on Cont. Neg.* (3d ed.), § 247; *City of Highlands v. Raine*, 23 Colo. 295 (1896); *Stevens v. Walpole*, 76 Mo. App. 213 (1898).

²⁵ *Stokes v. Township of Ralpho*, 187 Pa. St. 333 (1898).

his injury, will bar his recovery, and where his want of care is undeniable, he will be held guilty of contributory negligence, as a matter of law.²⁶ Whether one using a highway or street, with knowledge of the defects, is guilty of contributory negligence, is usually a question for the jury.²⁷ Previous knowledge of a defect, although it has an important and oftentimes decisive bearing on the question, is not conclusive, and the plaintiff may recover notwithstanding.²⁸

§ 350. Boarding or alighting from moving trains — Question of fact.— It is not contributory negligence, as a matter of law, to attempt to get on a moving train;²⁹ it is generally a question for the jury, upon a view of all the facts.³⁰ Some courts have held, that such conduct is contributory negligence,³¹ and others, that it was *prima facie* contributory negligence.³² It is not contributory negligence *per se* for a passenger to jump

²⁶ 7 Am. & Eng. Ency. of Law (2d ed.), p. 412. One passing along the sidewalk of a public street must use such care and circumspection as the circumstances require. *Quimby v. Filter*, Vr. ; 2 Mun. Corp. Cas. 23, n. (1899). That travellers on footways in public streets are required to look where they are going, is a proposition so plain, that it is not often called for adjudication. *Shallcross v. City of Philadelphia*, 187 Pa. St. 143 (1898).

²⁷ 7 Am. & Eng. Ency. of Law (2d ed.), p. 412.

²⁸ *Barton v. City of Springfield*, 110 Mass. 131 (1872).

²⁹ *Beach on Cont. Neg.* (3d ed.), § 146; *Baltimore &c. R. R. Co. v. Kane*, 69 Md. 11 (1888); *Johnson v. West Chester &c. R. R. Co.*, 70 Pa. St. 357 (1872); *Swigert v. Hannibal &c. R. R. Co.*, 75 Mo. 475 (1882); *Texas &c. Ry. Co. v. Murphy*, 46 Tex. 356 (1876).

³⁰ *Johnson v. West Chester &c. R. R. Co.*, 70 Pa. St. 357 (1872);

Western &c. R. R. Co. v. Wilson, 71 Ga. 22 (1883); *Kansas &c. Ry. Co. v. Dorough*, 72 Tex. 108 (1888).

³¹ *Phillips v. Rensselaer &c. R. R. Co.*, 49 N. Y. 177 (1872); *Harper v. Erie Ry. Co.*, 3 Vr. 88 (1866); *Chicago &c. Ry. Co. v. Scates*, 90 Ill. 586 (1878); *Missouri Pacific R. R. Co. v. Texas &c. R. R. Co.*, 36 Fed. Rep. 879 (1888); *McMurtry v. Louisville &c. Ry. Co.*, 67 Miss. 601 (1890); *McCorkle v. Chicago &c. Ry. Co.*, 61 Iowa, 555 (1883); *Denver &c. R. R. Co. v. Pickard*, 8 Colo. 163 (1884); *Weeks v. New Orleans &c. R. R. Co.*, 40 La. Ann. 800 (1888).

³² *Harvey v. Eastern R. R. Co.*, 116 Mass. 269 (1874). The boarding or alighting from a moving train is presumably and generally a negligent act *per se*; to rebut this presumption he must show, that he was put to alternative dangers by the act of the railroad company. *Solomon v. Manhattan Ry. Co.*, 103 N. Y. 437 (1886).

off a train which is moving.³³ Whether it is or not will depend upon whether, under all the circumstances, it was prudent for him to make the attempt,³⁴ although many cases have held such acts sufficient to prevent a recovery.³⁵ If a passenger jumps from a moving train, in opposition to the warnings of trainmen, it is contributory negligence;³⁶ but if it is done under the encouragement or direction of the company's servants, it is not contributory negligence.³⁷ The question of contributory negligence is one of fact for the jury.³⁸ If the passenger leaves

³³ Beach on Cont. Neg. (3d ed.), § 147; Louisville &c. R. R. Co. v. Crunk, 119 Ind. 542 (1889); Little Rock &c. Ry. Co. v. Atkins, 46 Ark. 423 (1885); Galveston &c. Ry. Co. v. Smith, 59 Tex. 406 (1883); Loyd v. Hannibal &c. R. R. Co., 53 Mo. 509 (1873); Pennsylvania R. R. Co. v. Kilgore, 32 Pa. St. 292 (1858); International &c. R. R. Co. v. Satherwhite, 15 Tex. Civ. App. 102 (1896).

³⁴ Louisville &c. R. R. Co. v. Crunk, 119 Ind. 542 (1889); Leslie v. Wabash &c. Ry. Co., 88 Mo. 50 (1885); Ralen v. Central Iowa Ry. Co., 74 Iowa, 732 (1887); Central R. R. &c. Co. v. Miles, 88 Ala. 256 (1889); Pennsylvania R. R. Co. v. Lyons, 129 Pa. St. 113 (1889); Craven v. Central Pacific R. R. Co., 72 Cal. 345 (1887); Price v. St. Louis &c. Ry. Co., 72 Mo. 414 (1880); Doss v. Missouri &c. R. R. Co., 59 Mo. 27 (1875); Kelly v. Hannibal &c. R. R. Co., 70 Mo. 604 (1879); Brooks v. Boston &c. R. R. Co., 135 Mass. 21 (1883); Cumberland Valley R. R. Co. v. Mangans, 61 Md. 53 (1883); Delamatyr v. Milwaukee &c. R. R. Co., 24 Wis. 578 (1869); Waller v. Hannibal &c. R. R. Co., 83 Mo. 608 (1884); New Jersey Traction Co. v. Gardner, 31 Vr. 571 (1897).

³⁵ Though warned not to do so. Pennsylvania R. R. Co. v. Aspell, 23 Pa. St. 147 (1854); Reibel v.

Cincinnati &c. Ry. Co., 114 Ind. 476 (1887); Walker v. Vicksburg &c. R. R. Co., 41 La. Ann. 795 (1889); Jarrett v. Atlanta &c. R. R. Co., 83 Ga. 347 (1889); Jewell v. Chicago &c. Ry. Co., 54 Wis. 610 (1882); Richmond &c. R. R. Co. v. Morris, 31 Gratt. 200 (1878); Central R. R. &c. Co. v. Letcher, 69 Ala. 106 (1881); Lucas v. New Bedford &c. R. R. Co., 6 Gray, 64 (1856); Chicago &c. R. R. Co. v. Randolph, 53 Ill. 510 (1870).

³⁶ Pennsylvania R. R. Co. v. Aspell, 23 Pa. St. 147 (1854); Jewell v. Chicago &c. Ry. Co., 54 Wis. 610 (1882).

³⁷ Waller v. Hannibal &c. R. R. Co., 83 Mo. 608 (1884); South. &c. R. R. Co. v. Schaufier, 75 Ala. 136, 142 (1883); Bucher v. New York &c. R. R. Co., 98 N. Y. 128 (1885); Central R. R. Co. v. Smith, 69 Ga. 268 (1882); St. Louis &c. R. R. Co. v. Cantrell, 37 Ark. 519 (1881); Filer v. New York &c. R. R. Co., 49 N. Y. 47 (1872); Lambeth v. North Carolina R. R. Co., 66 No. Car. 494 (1872).

³⁸ Bucher v. New York &c. R. R. Co., 98 N. Y. 128 (1885), Somerville, J.: "There are numerous cases where the question has been considered as to the effect of *advice* or *directions* given to passengers by conductors, or others in the management of vehicles and railroad trains. Two propositions

the train voluntarily, even though at the suggestion of the conductor or other trainmen, while the train is in motion, it is a question for the jury, whether he acted as a prudent man under the circumstances.³⁹ If the passenger leaps from a train in motion, under apprehension of impending peril and with a reasonable belief that by so doing, he is to escape injury, it is not, as a matter of law, contributory negligence.⁴⁰ Where the facts are undisputed and where the plaintiff's absence of care in alighting is clear, the question of contributory negligence need not be submitted to the jury.⁴¹

seem to be settled by the authorities, which may be stated as follows: *First*, such advice, even though plain and unambiguous, cannot be held to excuse an act of negligence on the part of an adult passenger, which would be so opposed to common prudence as to make it an obvious act of recklessness or folly. *Second*, where the act advised to be done is one where the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused." *South. &c. R. R. Co. v. Schaufier*, 72 Ala. 136, 142 (1883).

³⁹ *Beach on Cont. Neg.* (3d ed.), § 148; *South. &c. R. R. Co. v. Schaufier*, 75 Ala. 136 (1883); *Pennsylvania R. R. Co. v. Lyons*, 129 Pa. St. 113 (1889); *Benton v. Chicago &c. R. R. Co.*, 55 Iowa, 496 (1881); *Southwestern R. R. Co. v. Singleton*, 66 Ga. 252 (1880); 67 id. 306 (1881); *Galena &c. R. R. Co. v. Fay*, 16 Ill. 558 (1855). See *Cincinnati &c. R. R. Co. v. Peters*, 80 Ind. 168 (1881); *Pennsylvania Co. v. Dean*, 92 id. 459 (1884).

⁴⁰ *Beach on Cont. Neg.* (3d ed.),

§§ 40, 148; *Wilson v. Northern Pacific R. R. Co.*, 26 Minn. 278 (1879); *Buel v. New York Central R. R. Co.*, 31 N. Y. 314 (1865); *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418 (1881). *Coach. Frink v. Potter*, 17 Ill. 406 (1855); *Stokes v. Saltonstall*, 13 Pet. 181 (1839); *Jones v. Boyce*, 1 Stark. 493 (1816); *Ingalls v. Bills*, 9 Metc. 1 (1845); *Patterson's Ry. Accident Laws*, pp. 14, 62. See *Galena &c. R. R. Co. v. Yarwood*, 15 Ill. 468 (1854); *Galena &c. R. R. Co. v. Fay*, 16 id. 558 (1855).

⁴¹ *Morrison v. Erie Ry. Co.*, 56 N. Y. 302 (1874); *Burrows v. Erie Ry. Co.*, 63 id. 556 (1876); *Dougherty v. Chicago &c. R. R. Co.*, 86 Ill. 467 (1877); *Lake Shore &c. Ry. Co. v. Bangs*, 47 Mich. 470 (1882); *Houston &c. Ry. Co. v. Leslie*, 57 Tex. 83 (1882); *Illinois &c. R. R. Co. v. Green*, 81 Ill. 19 (1875); *Commonwealth v. Boston &c. R. R. Co.*, 129 Mass. 500 (1880). In Iowa it is a misdemeanor to jump from a car in motion without the consent of those in charge of the train, which will prevent a recovery without proof of such consent. Such consent may be inferred by the jury from the conduct of the conductor at the time. Act 16, Gen. Assem. 1876, Iowa, chap. 148, § 2; *Raben v. Central Iowa Ry. Co.*, 74 Iowa, 732 (1887).

§ 351. **Boarding or alighting from electric cars in motion.**—To board or depart from an electric car, while in motion, is not negligence *per se*. It is a question for the jury.⁴²

§ 352. **Riding on platforms of electric cars.**—“Riding upon the platforms of such cars—*i. e.*, electric street cars—is too much encouraged by transportation companies and too much indulged in by the public, for the court to say, as a matter of law, that the mere riding upon the platform of such a car is conclusive evidence of negligence, or is negligence *per se*, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard and fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury in connection with all of the other circumstances of the case.”⁴³ The court cannot say, that riding on the fender or outside platform of an omnibus sleigh, in the streets of Boston, is such want of ordinary care as to prevent a recovery for an injury sustained from a collision with another sleigh.⁴⁴ In Pennsylvania, it was held, that a passenger who remains on the platform of a moving trolley car, when there are vacant seats inside the car, is guilty of such negligence, as will preclude a recovery for an injury sustained by the passenger in a collision of the car.⁴⁵

§ 353. **Riding on platforms of steam cars.**—It is not negligence *per se* for a passenger to ride upon the platform of a

⁴² Cicero &c. Ry. Co. v. Meixner, 160 Ill. 320 (1896); Sexton v. Ry. Co. v. Lauer, 21 Ind. App. 466 (1898); North Chicago Street R. R. Co. v. Baur, 79 Ill. App. 121 (1898); Metropolitan Street Ry. Co., 57 N. affirmed, 179 Ill. 126; Scott v. Bergen County Traction Co., Vr. ; Y. Supp. 577 (1899).

⁴³ Wiswell, J., in Watson v. Portland &c. Ry. Co., 91 Me. 584, 591 (1898). See City Ry. Co. v. Lee, 21 Vr. 435 (1888); Sibley v. New Orleans &c. R. R. Co., 49 La. Ann. 588 (1897); Meesel v. Lynn &c. R. R. Co., 8 Allen, 234 (1864).

⁴⁴ Spofford v. Harlow, 3 Allen, 176 (1861).

⁴⁵ Thane v. Scranton Traction Co., Pa. St. ; 6 Am. Neg. Rep. 185 (1899).
The position is a condition and not a cause of the injury. Thirteenth &c. Ry. Co. v. Boudrou, 92 Pa. St. 475 (1880); Terre Haute Electric

railway car,⁴⁶ nor is it negligence to stand upon the platform of cars in motion, when there are no vacant seats inside the car.⁴⁷ It has been held, that to stand or ride upon the platform, is such negligence, as will prevent a recovery for injuries while there.⁴⁸ Passing on the platform, from car to car, on a train, in motion, with the sanction of the conductor, on a proper errand, is not contributory negligence.⁴⁹ One is justified in assuming that the cars are properly coupled.⁵⁰

§ 354. Riding in baggage car or other exposed position on steam cars.— To ride in a baggage car, contrary to the rules of the company, is contributory negligence.⁵¹ If being in the baggage

⁴⁶ Beach on Cont. Neg. (3d ed.), § 149; Zemp v. Wilmington &c. R. R. Co., 9 Rich. 84 (Law 1855); Dickinson v. Port Huron &c. Ry. Co., 53 Mich. 43 (1884).

⁴⁷ Werle v. Long Island R. R. Co., 98 N. Y. 650 (1885); Dewire v. Boston &c. R. R. Co., 148 Mass. 343 (1889); Willis v. Long Island R. R. Co., 34 N. Y. 670 (1866). It is the duty of a passenger standing on the platform of a steam railroad car to go inside the car when requested so to do by a person having charge of the train, if there is standing room inside, although there are no vacant seats. Graville v. Manhattan R. R. Co., 105 N. Y. 525 (1887).

⁴⁸ Whart. on Neg., § 367; Memphis &c. Ry. Co. v. Salinger, 46 Ark. 528 (1885); Malcom v. Richmond &c. R. R. Co., 106 No. Car. 63 (1890); Louisville &c. R. R. Co. v. Bisch, 120 Ind. 549 (1889); Camden &c. R. R. Co. v. Hoosey, 99 Pa. St. 492 (1882); Hickey v. Boston &c. R. R. Co., 14 Allen, 429 (1867); McAunich v. Mississippi &c. R. R. Co., 20 Iowa, 338 (1866); Quinn v. Illinois Central R. R. Co., 51 Ill. 495 (1869); Alabama &c. R. R. Co. v. Hawk, 72 Ala. 112 (1882).

⁴⁹ Cotchett v. Savannah &c. Ry. Co., 84 Ga. 687 (1890); McIntyre v. New York Central R. R. Co., 43 Barb. 532; affirmed, 37 N. Y. 287 (1867). Unless he knows that to do so would be dangerous. Louisville &c. R. R. Co. v. Kelly, 92 Ind. 371 (1883); Hannibal &c. R. R. Co. v. Martin, 111 Ill. 219 (1884).

⁵⁰ Hannibal &c. R. R. Co. v. Martin, 111 Ill. 219 (1884). Or if a passenger is on the platform of the car attempting to escape from the effects of a collision at the time he was injured, he is not standing or riding upon the platform in such a sense as to excuse the company under the regulation prohibiting passengers from standing or riding on the platform when the cars are in motion. Buel v. New York Central R. R. Co., 31 N. Y. 314 (1865).

⁵¹ Beach on Cont. Neg. (3d ed.), § 150; 39 Am. & Eng. R. R. Cas. 409, note; Fetter Carriers of Passengers, § 371; Pennsylvania R. R. Co. v. Langdon, 92 Pa. St. 21 (1879); Kentucky Central R. R. Co. v. Thomas, 79 Ky. 160 (1880); Houston &c. R. R. Co. v. Clemmons, 55 Tex. 88 (1881). See Jacobus v. St. Paul &c. Ry. Co., 20 Minn. 125 (1873).

car is not the proximate cause of the injury, there may be a recovery.⁵² It is a question of fact for the jury.⁵³ The passenger, by taking a position in the baggage compartment, takes the risk of any injury from dangers inherent in the construction or use thereof, for the purpose of carrying baggage, but not from causes *ab extra*, such as a collision.⁵⁴ If the servants in charge of the train direct the passenger to ride in a particular place, such as the baggage car, and he is injured, the passenger is not guilty of contributory negligence.⁵⁵ It is contributory negligence to ride upon the locomotive, even with the consent of the trainmen,⁵⁶ or upon freight trains, in violation of the company's rules.⁵⁷ If a person takes an exposed position, upon a train not designated for the use of passengers, he himself incurs the special risks of that position, whether he takes it by the license, non-interference, or even express permission of the conductor,⁵⁸ or upon hand cars,⁵⁹ or upon the top of freight

⁵² Jones v. Chicago &c. Ry. Co., 43 Minn. 279 (1890); Webster v. Rome &c. R. R. Co., 115 N. Y. 112 (1889); Kentucky Central R. R. Co. v. Thomas, 79 Ky. 160, 166 (1880); New York &c. R. R. Co. v. Ball, 24 Vr. 283 (1891).

⁵³ Webster v. Rome &c. R. R. Co., 115 N. Y. 112 (1889).

⁵⁴ New York &c. R. R. Co. v. Ball, 24 Vr. 283 (1891). See Webster v. Rome &c. R. R. Co., 115 N. Y. 112 (1889).

⁵⁵ Beach on Cont. Neg. (3d ed.), § 151; O'Donnell v. Allegheny R. R. Co., 50 Pa. St. 490, 493 (1865); 59 id. 239 (1868). Saloon car of a freight railway train. Dunn v. Grand Trunk Ry. Co., 58 Me. 187 (1870). Caboose of a freight train. Edgerton v. New York &c. R. R. Co., 39 N. Y. 227 (1868). Hand-car furnished by the defendant. Pool v. Chicago &c. R. R. Co., 53 Wis. 657 (1881); Wasburn v. Nashville &c. R. R. Co., 3 Head, 638 (1859). See Pennsylvania R. R. Co. v. Langdon, 92 Pa. St. 21, 28 (1879).

⁵⁶ Virginia &c. R. R. Co. v. Roach, 83 Va. 375 (1887); Stringer v. Missouri Pacific Ry. Co., 96 Mo. 299 (1888); Files v. Boston &c. R. Co., 149 Mass. 204 (1889).

⁵⁷ Gulf &c. Ry. Co. v. Campbell, 76 Tex. 174 (1890); Houston &c. Ry. Co. v. Moore, 49 Tex. 31 (1878); Eaton v. Delaware &c. R. R. Co., 57 N. Y. 382 (1872).

⁵⁸ Files v. Boston &c. R. R. Co., 149 Mass. 204, 206 (1889). By statute in Missouri. (Rev. Stats., § 800), if a passenger on any railroad shall be injured when on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the company, such company shall not be liable for the injury, if said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers. Sherman v. Hannibal &c. R. R. Co., 72 Mo. 62, 66 (1880).

⁵⁹ Not a common carrier of passengers by hand-cars. Hoar v.

cars,⁶⁰ or in sitting in a loose chair tipped up against a box close to an open side door.⁶¹

§ 355. **Riding on freight trains.**— Shippers of stock are not necessarily negligent in riding in places commonly deemed dangerous.⁶² Where one is received by a railroad as a passenger on its freight train, the same degree of care is due him, that the road owes to its passengers on its regular trains, except that in taking the freight train he accepts and travels on it, acquiescing

Maine Central R. R. Co., 70 Me. 65 (1879); Pool v. Chicago &c. R. R. Co., 53 Wis. 657 (1881); International &c. R. R. Co. v. Cock, 68 Tex. 713 (1887); distinguished, Price v. International &c. Ry. Co., 64 Tex. 144 (1885). Where a boy between twelve and thirteen years of age, was permitted by the employes of a railway to ride upon the hand-car, which they were operating, and falling therefrom, was run over, the following rules of law governed his right to recover damages for the injury: (1) Whether or not the plaintiff was able to appreciate the danger of getting upon the car was a question of fact for the jury. (2) If he was not, and it was dangerous, and defendant's employes invited or permitted him to ride there, defendant would be liable, though it had forbidden them to permit any one to ride on the car. (3) If plaintiff was able to appreciate the danger the following rules would apply: The burden was on him to prove that the employes had authority to permit him to ride thereon. The company's rules forbidding them so to do were admissible in evidence whether known to plaintiff or not. Proof of such authority would in

such case affect the degree of care due to plaintiff under the circumstances, but not relieve him from the consequences of his own negligence. If the employes had no such authority defendant could not be held liable for the injuries, though they were guilty of negligence. Missouri &c. Ry. Co. v. Rodgers, 89 Tex. 675 (1896).

⁶⁰ Little Rock &c. Ry. Co. v. Miles, 40 Ark. 298 (1883).

⁶¹ Norfolk &c. R. R. Co. v. Ferguson, 79 Va. 241 (1884). Plaintiff was a passenger on one of defendant's trains; he was seated on a chair in a caboose, which was fastened to a train of cars; he was thrown from his chair against the stove and injured. It was held, that plaintiff was not, as a matter of law, guilty of contributory negligence in sitting on a chair which was in the car. Quackenbush v. Chicago &c. Ry. Co., 73 Iowa, 458 (1887).

⁶² A stock passenger on the top of a train. Tibby v. Missouri Pacific Ry. Co., 82 Mo. 292 (1882); Union Ry. & Transit Co. v. Shacklett, 19 Ill. App. 145 (1886); Florida Ry. &c. Co. v. Webster, 25 Fla. 394 (1889); Indianapolis &c. R. R. Co. v. Horst, 93 U. S. 291 (1876).

in the usual incidents and conduct of a freight train managed by competent and prudent men.⁶³

§ 356. **Resting arm on window sill — Standing or leaning against seat.**— Resting one's arm on the window-sill, within the car, is not contributory negligence,⁶⁴ but extending the arm, or other part of the body, through the open window, beyond the exterior of the sash, is negligence.⁶⁵ Whether or not, the mere fact, that the plaintiff had his arm outside of the car window, contributed to produce the injury complained of, is a proper question for the jury.⁶⁶ The question may turn upon the point whether notice of the danger was given.⁶⁷ A passenger, sitting close to the front door of a crowded car, when passing through a tunnel, attempted to shut the door while the car was in total darkness, in order to keep out the smoke and cinders, and in doing so was injured. In an action for damages brought by him against the railroad company, it was held, that the plaintiff's contributory negligence was properly submitted to the jury.⁶⁸

⁶³ *McGee v. Missouri Pacific Ry. Co. v. Lickings*, 5 Bush, 1 (1869); Co., 92 Mo. 208 (1887); *Wagner v. Gee v. Metropolitan Ry. Co.*, L. R., Missouri Pacific Ry. Co., 97 id. 512 8 Q. B. 165 (1873). (1888).

⁶⁴ *Beach on Cont. Neg.* (3d ed.), § 156; *Quinn v. South Carolina Ry. Co.*, 29 So. Car. 381 (1888); *Law*, p. 284; *Germantown Pass. Ry. Co. v. Brophy*, 105 Pa. St. 38 (1884); *Farlow v. Kelly*, 108 U. S. 288 (1882); *Whart. on Neg.*, § 361; *Shearm. & Redf. on Neg.* (5th ed.), § 281.

⁶⁵ *Dun v. Seaboard &c. R. R. Co.*, 78 Va. 645 (1884); *Pittsburgh &c. R. R. Co. v. McClurg*, 56 Pa. St. 294 (1867), overruling *New Jersey R. R. Co. v. Kennard*, 21 id. 203 (1853); *Pittsburgh &c. R. R. Co. v. Andrews*, 39 Md. 329 (1873); *Holbrook v. Utica &c. R. R. Co.*, 12 N. Y. 236, 244 (1855); *Todd v. Old Colony &c. R. R. Co.*, 3 Allen, 18 (1861); 7 id. 207 (1863); *Indianapolis &c. R. R. Co. v. Rutherford*, 29 Ind. 82 (1867); *Louisville &c. R. R. Co.*, 17 Wis. 487 (1863); *New Jersey R. R. Co. v. Kennard*, 21 Pa. St. 203 (1853); overruled, *Pittsburgh &c. R. R. Co. v. McClurg*, 56 id. 294 (1867).

⁶⁷ *Beach on Cont. Neg.* (3d ed.), § 158; *Patterson's Ry. Accident Law*, p. 15; *Whart. on Neg.*, § 363; *Laing v. Colder*, 8 Pa. St. 479 (1848); *Dun v. Seaboard &c. R. R. Co.*, 78 Va. 645 (1884).

⁶⁸ *Western &c. R. R. Co. v. Stanley*, 61 Md. 266 (1883).

A passenger is negligent, who unnecessarily stands or leans against the seat and is injured by bumping and jolting, in the coupling and management of freight trains.⁶⁹

§ 357. **At railroad crossings — Duty to look and listen.**— It is a fundamental principle in the law of negligence, enunciated in a multitude of cases, that one about to cross the tracks of a steam railroad, at a highway crossing, is bound to look and listen for the approach of the cars. A person about to cross a railroad is bound to use his eyes and ears, to watch for sign-boards and signals, to listen for bell or whistle, and to guard against the approach of a train by looking each way before crossing.⁷⁰ The track itself is a signal of danger.⁷¹

⁶⁹ Harris v. Hannibal &c. R. R. Co., 89 Mo. 233 (1886); Crine v. East Tenn. &c. Ry. Co., 84 Ga. 651 (1890); Reber v. Bond, 38 Fed. Rep. 822 (1889). Question for the jury. Wallace v. Western &c. R. R. Co., 98 No. Car. 494 (1887); Smith v. Richmond &c. R. R. Co., 99 id. 241 (1888). It is not negligence *per se* in a passenger in a railroad car to leave his seat and pass to another part of the car. Burr v. Pennsylvania R. R. Co., Vr. (1899, N. J.).

⁷⁰ Pennsylvania R. R. Co. v. Righter, 13 Vr. 180, 185 (1880); Washington Southern Ry. Co. v. Lacey, 94 Va. 460 (1897). See § 56; Shearm & Redf. on Neg. (5th ed.), chap. 21, § 90; Beach on Cont. Neg. (3d ed.), § 181; Patterson's Ry. Accident Law, 168.

⁷¹ Washington Southern Ry. Co. v. Lacey, 94 Va. 460 (1897); Lake Shore &c. R. R. Co. v. Miller, 25 Mich. 290 (1872).

CHAPTER XIV.

MASTER AND SERVANT — FELLOW SERVANTS.

- § 358. Master and servant — Generally — Fellow servants.
359. Fellow servants — Classification of the principle.
360. Confusion in the application of the principle — Statutes.
361. Illustrative cases — Who are fellow servants.
362. The same subject continued — Who are fellow servants.
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371. The same subject continued — Who are not fellow servants.
372. The same subject continued — Who are not fellow servants.

§ 358. Master and servant — Generally — Fellow servants.— The duty of a master to his servant, is founded upon what is determined to be the implied contract relation between them. The master is only liable to his servants for his own negligence. The law imposes upon the master the duty to use ordinary care, diligence and skill, to provide and furnish the servant reasonably safe and suitable machinery, appliances and tools to do his work, as safely as the hazards, incident to the work, will permit; to provide a reasonably safe place at which to do the master's work, which includes the duty of inspection and repair when necessary; to give sufficient and adequate instructions and warnings of unusual dangers and risks known to the master, but unknown to inexperienced or young servants; to employ and retain, when the nature of the work requires it, a sufficient number of competent and trustworthy fellow servants; and in some States, to make and promulgate proper rules for managing

the business or work to be done. When the servant is injured in the service of his master, the burden of proof rests on the servant, to show and point out specifically, wherein the master failed to fulfill his implied contractual duties to his servant; or wherein the master failed to exercise that reasonable and ordinary care and diligence for the protection of his servant, which the law exacts from him as a measure of duty towards his servants. If, at the trial, the servant fails to make proof of the master's negligence, or to prove that the master failed to exercise reasonable care and diligence to protect his servants, as the natural and proximate cause of the injury, the servant will fail, and will be nonsuited. The master's defense in this class of cases is that he did, in point of fact, exercise all the care and diligence for the protection of his servants, which the law exacts from him. He is entitled to the presumption of law that he did his duty towards his servant, until the contrary is shown by legal proof. This may properly be called a defense in fact. There are other defenses; when the master says the facts are admitted as true, but in point of law, he is not liable to his servant for the injury which he has received, such as, that the injury to the servant was caused by his own contributory negligence; but an assumption by the servant of the ordinary risks incident to the work is not contributory negligence. If the servant is guilty of contributory negligence, he is precluded from a recovery; or if the injury was caused by the negligence of a fellow servant, that is, the failure of a fellow servant to exercise reasonable care; in which case the servant cannot recover, because it is one of the implied conditions of the service, that the master is not liable at common law to his servants for injuries to them, caused by the negligence of a fellow servant in the same employment of a common master.¹ The first reported cases, in which this principle of law was applied by the courts in the United States, were in the States of South Carolina² and Massachusetts.³ Chief Justice Shaw wrote the opinion in the Massachusetts case, in which he said, that it was an action of new impression in the courts, involving a principle of great

¹ See § 65.

² *Murray v. South Carolina R. R. Co.*, 1 McMull. L. 385 (1841).

³ *Farwell v. Boston &c. R. R.*

Co., 4 Metc. 49 (1842); *Priestly v. Fowler*, 3 M. & W. 1 (1837) is the first case in the English reports.

importance, and placed the reason of the rule on the ground, that the servant, by the contract of employment, assumed the risks of the employment, of which the negligence of the fellow servants in the same employment was included. In the South Carolina case, it was placed on the ground of a joint undertaking or effort, on the part of the several servants employed by the master, and that they were not liable to the master for the conduct of each other. This, like many of the principles of the law of negligence, is universally applied by the courts under the common law. But when the principle is applied to particular cases by the courts, in the various jurisdictions, there is much confusion and uncertainty in determining who are such fellow servants, and what is a common service or employment within the meaning of the rule. The broad distinction on which the adjudged cases are made to turn, is this: *First*, upon the character of the act. *Second*, upon the grade or rank of the offending servant or employe.⁴

§ 359. **Fellow servants — Classification of the principle.**—The United States Supreme Court held, that the conductor of a passenger train was not a fellow servant with the engineer.⁵ In a later case the court attempted to explain the effect of that case, and to limit its application, and held, that an engineer and a fireman of a locomotive engine, running alone on a railroad and

⁴ "The true test is, was the offending servant in the performance of the master's duty, or charged with the performance thereof, not generally, but in reference to the particular act or omission causing such injury? If he was, then he represents the master, and the latter's responsibility follows. If not; if the act or omission was that of a servant—that is, performing the work of a servant,—then, without reference to the grade of the servant or employe, or his right to employ or discharge men, or of his control over them, he is but a fellow servant, for whose failure of duty the employe assumes the risk." Bailey

on Masters' Liability for Injuries to Servants, p. 238.

⁵ *Chicago &c. Ry. Co. v. Ross*, 112 U. S. 377 (1884); approved, *North Carolina, Mason v. Richmond &c. R. R. Co.*, 111 No. Car. 482, 495 (1892); *Virginia, Ayres v. Richmond &c. R. R. Co.*, 84 Va. 679, 684 (1888); *Johnson v. Richmond &c. R. R. Co.*, 84 id. 713 (1888); *Richmond &c. R. R. Co. v. Williams*, 86 id. 165 (1889); *Colorado, Denver &c. R. R. Co. v. Discoll*, 12 Colo. 520 (1889); *Louisiana, Farren v. Sellers*, 39 La. Ann. 1011 (1887); *Towns v. Vicksburg &c. R. R. Co.*, 37 id. 630 (1885); *South Carolina, Boatwright v. Northwestern R. R. Co.*, 25 So. Car. 128 (1886).

without any cars attached, are fellow servants.⁶ The court also said, that the point is not a question of local law, to be settled by the decisions of the highest court of the State in which a cause of action arises, but is one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relation of master and servant. In those courts where the character of the act is made the essential element, in determining the master's liability for injuries to his servants, from the fault or negligence of other servants, a further distinction is made between the premises and appliances furnished for use, and the use of them.⁷ Many of the courts make such liability of the master depend upon the grade or rank of the servants. This is known as the rule of superior and subordinate.⁸ In some of the States, the courts, in deciding who are fellow servants and what is a common employment, have laid stress upon the fact, and distinguished the character of the service by holding that, where the servants were in the performance of the master's duty, or charged with

⁶ *Baltimore &c. R. R. Co. v. 94 id. 607 (1893); Palmer v. Michigan* Baugh, 149 U. S. 368 (1893); approved, *Arkansas, Bloyd v. St.* (1892); *Harrison v. Detroit &c. R. Co., 58 Ark. 66 (1893).* *R. Co., 79 id. 409 (1890); Morton v. See Northern Pacific R. R. Co. v. Detroit &c. R. R. Co., 81 id. 433* Herbert, 116 U. S. 642 (1885). (1890).

⁷ This is generally so in the following States:

New York: *Brick v. Rochester &c. R. R. Co., 98 N. Y. 211, 215* (1885).

Maine: *Shanny v. Androscoggin Mills, 66 Me. 420* (1876).

California: *Beeson v. Green Mountain &c. Co., 57 Cal. 20* (1880).

Indiana: *Cincinnati &c. R. R. Co. v. McMullen, 117 Ind. 439* (1888); *Ohio &c. Ry. Co. v. Percy, 128 id. 197* (1890).

Minnesota: *Fraser v. Red River Lumber Co., 45 Minn. 235* (1891); *Lindvall v. Woods, 41 id. 212* (1889).

Michigan: *Sadowski v. Michigan Car Co., 84 Mich. 100, 106* (1890); *Roux v. Blodgett &c. Lumber Co.,*

Pennsylvania: *Pennsylvania &c. R. R. Co. v. Mason, 109 Pa. St. 296* (1885); *Mullan v. Philadelphia &c. Steamship Co., 78 id. 25* (1875).

West Virginia: *Jackson v. Norfolk &c. R. R. Co., 43 W. Va. 380* (1897).

⁸ This is generally so in the following States:

Ohio: *Little Miami R. R. Co. v. Stevens, 20 Ohio, 415* (1851); *Berea Stone Co. v. Kraft, 31 Ohio St. 287, 291* (1877).

Nebraska: *Sioux City &c. R. R. Co. v. Smith, 22 Neb. 775* (1888); *Burlington &c. R. R. Co. v. Crockett, 19 id. 138* (1886); *Chicago &c. Ry. Co. v. Ludstrom, 16 id. 254* (1884).

the performance thereof, not generally, but in reference to the particular act or omission causing the injury, and were clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence, they are not fellow servants.⁹ In some of the States, the master's liability for an injury to a servant, caused by the negligence of another servant, is made to depend, not upon the grade or rank of the servants, but upon the character of the act.¹⁰ In others, upon the rule of superior and subordinate, *i. e.*, the doctrine which imputes to the master the negligence of a servant, to whom he has delegated authority over other servants.¹¹ The power to hire and discharge inferior servants has been made the test,¹² although this is said not to be an invariable test.¹³ In Illinois, it is said to turn upon the idea of co-association, *i. e.*, that the servants shall be directly co-operating with each other in a particular business, or their usual duties shall bring them into habitual association, so that they may

⁹ This was the point on which the Ross case turned in the United States Supreme Court. Chicago &c. Ry. Co. v. Ross, 112 U. S. 377 (1884). This is so generally in the following States:

New York: *Malone v. Hathaway*, 64 N. Y. 5 (1876).

Maine: *Wormell v. Maine Central R. R. Co.*, 79 Me. 397 (1887).

Missouri: *Parker v. Hannibal &c. R. R. Co.*, 109 Mo. 362 (1891).

North Carolina: *Mason v. Richmond &c. R. R. Co.*, 111 No. Car. 482 (1892).

Virginia: *Moon v. Richmond &c. R. R. Co.*, 78 Va. 745 (1884).

Minnesota: *Lindvall v. Woods*, 41 Minn. 212 (1889).

Colorado: *Colorado &c. R. R. Co. v. Naylor*, 17 Colo. 501 (1892).

¹⁰ *Crispin v. Babbitt*, 81 N. Y. 522 (1880); *Ell v. Northern Pacific R. R. Co.*, 1 No. Dak. 336 (1891); *Sayward v. Carlson*, 1 Wash. St. 29, 43 (1890); *Colorado &c. R. R. Co. v. Naylor*, 17 Colo. 501 (1892); *Lind-*

vall v. Woods, 41 Minn. 212 (1889); *Galveston &c. Ry. Co. v. Smith*, 76 Tex. 611 (1890).

¹¹ *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415 (1851); *Berea Stone Co. v. Kraft*, 31 Ohio St. 287 (1877); *Beuring v. Chesapeake &c. Ry. Co.*, 37 W. Va. 502 (1892); *Sioux City &c. R. R. Co. v. Smith*, 22 Neb. 775 (1888); *Bloyd v. St. Louis &c. Ry. Co.*, 58 Ark. 66 (1893).

¹² *Madden v. Chesapeake &c. R. R. Co.*, 28 W. Va. 610, 618 (1886).

¹³ *Webb v. Richmond &c. R. R. Co.*, 97 No. Car. 387 (1887); *Palmer v. Michigan Central R. R. Co.*, 93 Mich. 363 (1892); *Missouri Pacific Ry. Co. v. Williams*, 75 Tex. 4 (1889). The fact that one employe upon a railroad is hired and discharged by one superior agent and another by another, does not affect the relation of the employes to each other as fellow servants. *Slater v. Jewett*, 85 N. Y. 61 (1881); *Hall v. St. Joseph Water Co.*, 48 Mo. App. 356 (1891).

exercise mutual influence over each other, promotive of proper caution and common safety.¹⁴

§ 360. Confusion in the application of the principle — Statutes.

— It is doubtful if any rule can be formulated that will be of much value in its application to particular cases, as was said, by Mr. Chief Justice Magie, of the New Jersey Supreme Court: “But there are, doubtless, many cases where it will be difficult to draw the line between the employe who represents his employer, and the workman who stands on the footing of a common employment with his fellow workman. To attempt to explore the adjudged cases on this subject, is to bewilder one’s self in a maze of decisions, inconsistent with each other, and often irreconcilable with the principles at the foundation of the liability of the master to a servant.”¹⁵ There are many cases in the books, and there will always be others coming before the courts, in which this rule of law will be carried to its extreme limits in both directions, as the court may be influenced, either by the particular facts of the case, or by broad principles of general public policy, as in the Ross case,¹⁶ decided by the United States Supreme Court, which is said to extend the rule to its utmost limit, in one direction; so much so, that in a subsequent case, the court felt called upon to explain that decision.¹⁷ In some of the States, the courts seem purposely, to leave this subject within the extreme limits of the rule undetermined, so that it may be sufficiently flexible to meet emergencies, as was said by the Supreme Court of Errors of the State of Connecticut, “That cases are constantly arising, especially in the operation of railroads, which no general rule can provide for.”¹⁸ In

¹⁴ North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57 (1885); Chicago &c. R. R. Co. v. Moranda, 93 id. 302 (1879); Chicago &c. R. R. Co. v. Hoyt, 122 id. 369 (1887). This doctrine is said to be peculiar to the courts of Illinois. Criticised in Brodeur v. Valley Falls Co., 16 R. I. 448 (1889). ¹⁷ Baltimore &c. R. R. Co. v. Baugh, 149 U. S. 368 (1893). ¹⁸ Darrigan v. New York &c. R. R. Co., 52 Conn. 285, 305 (1884). The same is true in Arkansas. Bloyd v. St. Louis &c. Ry. Co., 58 Ark. 66 (1893); Missouri, Parker v. Hannibal &c. R. R. Co., 109 Mo. 362 (1891); Washington, Sayward v. Carlson, 1 Wash. St. 29, 44 (1890).

¹⁵ Rogers Locomotive Works v. Hand, 21 Vr. 464, 467 (1888).

¹⁶ Chicago &c. Ry. Co. v. Ross, 112 U. S. 377 (1884).

some of the States the common-law rule has been modified by statute, either generally or in its application to employes of railroad corporations only.¹⁹

§ 361. **Illustrative cases — Who are fellow servants.**—In the following cases employes have been held to be fellow servants, within the meaning of this rule: A train dispatcher and a locomotive fireman;²⁰ brakeman and conductor;²¹ passenger conductor and switchtender;²² brakeman and brakeman acting as conductor;²³ laborer on roadbed, while riding on a gravel

¹⁹This is so in the following States:

Massachusetts: Applies to all employes. Stats., chap. 270, Laws of 1887.

California: Code, § 1970.

Montana: Comp. Stats. 1888, p. 817, § 697.

Alabama: Stats. 1886; Code, §§ 2590–2592.

Georgia: Code 1882, §§ 2083, 2202, Contributory negligence. Code 1882, § 3036.

Iowa: Applies to corporations operating a railway. Code, § 1307. Which the courts of that State have held must be the moving of trains and will include an employe injured while loading a dirt car. *Deppe v. Chicago &c. R. R. Co.*, 36 Iowa, 52 (1872).

Minnesota: Chap. 13, Laws 1887. The same construction has been placed upon that statute as the Iowa courts. *Lavallee v. St. Paul &c. Ry. Co.*, 40 Minn. 249 (1889).

Kansas: 1 Gen. Stats. 1889, par. 1251. Is not confined to employes while engaged in moving trains. *Atchison &c. R. R. Co. v. McKee*, 37 Kan. 592 (1887).

Texas: Laws of 1891, chap. 24.

Wisconsin: Chap. 173, Laws 1875; chap. 232, Laws 1880; chap. 438, Laws 1889; chap. 220, Laws 1893.

Mississippi: Code 1892, § 3559.

Florida: Chap. 4071, Laws 1891.

For a full, comparative and comprehensive discussion of this subject, where the facts to which the courts applied the principle, are given somewhat at length, the reader is referred to *Master's Liability for Injuries to Servants* by Judge Bailey, pp. 226–393; *Shearm. & Redf. on Neg.* (5th ed.), §§ 224–241; *Thomas on Neg.*, p. 866; *Beach on Cont. Neg.* (3d. ed.), § 311 *et seq.* It is questionable whether the cases decided on this question have much or any value outside of the jurisdiction in which they were made.

²⁰ *Hankins v. New York &c. R. R. Co.*, 55 Hun, 51 (1889).

²¹ *Northern Pacific R. R. Co. v. Poirier*, 167 U. S. 48 (1897); *Pease v. Chicago &c. Ry. Co.*, 61 Wis. 163 (1884); *Smith v. Potter*, 46 Mich. 258 (1881). *Contra*, when of different trains. *Daniel v. Chesapeake &c. Ry. Co.*, 36 W. Va. 397 (1892); *Jackson v. Norfolk &c. R. R. Co.*, 43 W. Va. 380 (1897).

²² *Farwell v. Boston &c. R. R. Co.*, 4 Metc. 49 (Mass. 1842).

²³ *Hayes v. Western R. R. Co.*, 3 Cush. 270 (1849).

train to his place of labor, and those in charge of the train;²⁴ fireman and conductor;²⁵ superintendent of corporation and operatives;²⁶ car repairer and switchman;²⁷ sewer laborers under the same general superintendence;²⁸ foreman and laborers;²⁹ roadmaster and engineer;³⁰ trench digger and city superintendent;³¹ inspector of cars and brakeman;³² employe making ordinary repairs on a machine, and operative of such machine;³³ section hand and engineer and section boss;³⁴ mate and common seaman;³⁵ brakemen and the men who make up the trains.³⁶

§ 362. The same subject continued — Who are fellow servants.

— Brakeman and car inspector;³⁷ founder in a blast furnace, and the engineer of the locomotive used in moving cars on the premises;³⁸ painters and carpenters using the same scaffolding;³⁹ a section hand and a conductor and engineer;⁴⁰ a sawmill hand

²⁴ Gillshannon v. Stoney Brook R. R. Co., 10 Cush. 228 (1852). ³⁵ Benson v. Goodwin, 147 Mass. 237 (1888).

²⁵ Slater v. Jewett, 85 N. Y. 61 (1881). ³⁶ Thyng v. Fitchburg R. R. Co., 156 Mass. 16 (1892). See Stats. 1887, chap. 270, § 1, cl. 3. The rule in Massachusetts reviewed. Moynihan v. Hills Co., 146 Mass. 586 (1888). Employers Liability Act.

²⁶ Albro v. Agawam Canal Co., 6 Cush. 75 (1850).

²⁷ Gilman v. Eastern R. R. Co., 10 Allen, 233 (1865).

²⁸ Johnson v. City of Boston, 118 Mass. 114 (1875); Zeigler v. Day, 123 Mass. 152 (1877).

²⁹ O'Connor v. Roberts, 120 Mass. 227 (1876); Faber v. Carlisle Mfg. Co., 126 Pa. St. 387 (1889); Fitzgerald v. Honkomp, 44 Ill. App. 365 (1892); Hoth v. Peters, 55 Wis. 405 (1882); Allen v. Goodwin, 92 Tenn. 385 (1892); Prevost v. Citizens Ice & C. Co., 185 Pa. St. 617 (1898); Olson v. St. Paul & C. Ry. Co., 38 Minn. 117 (1888).

³⁰ Walker v. Boston & C. R. R. Co., 128 Mass. 8 (1879).

³¹ Flynn v. City of Salem, 134 Mass. 351 (1883).

³² Mackin v. Boston & C. R. R. Co., 135 Mass. 201 (1883).

³³ McGee v. Boston Cordage Co., 139 Mass. 445 (1885).

³⁴ Clifford v. Old Colony R. R. Co., 141 Mass. 564 (1886).

³⁷ Little Miami R. R. Co. v. Fitzpatrick, 42 Ohio St. 318 (1884); Philadelphia & C. R. R. Co. v. Hughes, 119 Pa. St. 301 (1888); Nashville & C. R. R. Co. v. Foster, 10 Lea, 351 (1882). *Contra*, Morton v. Detroit & C. R. R. Co., 81 Mich. 423 (1890); Fay v. Minneapolis & C. Ry. Co., 30 Minn. 231 (1883); Tierney v. Minneapolis & C. Ry. Co., 33 id. 311 (1885); Macy v. St. Paul & C. R. R. Co., 35 id. 200 (1886).

³⁸ Adams v. Iron Cliffs Co., 78 Mich. 271 (1889).

³⁹ Hoar v. Merritt, 62 Mich. 386 (1886).

⁴⁰ Harrison v. Detroit & C. R. R. Co., 79 Mich. 409 (1890).

and the engineer;⁴¹ brakeman and employe loading cars;⁴² a servant furnishing a defective tool, and one using it;⁴³ a stone mason and carpenter, at work on the same bridge;⁴⁴ servant in charge and one cleaning a locomotive;⁴⁵ a section foreman and track hands;⁴⁶ a member of one section gang and the section boss of another gang;⁴⁷ a laborer employed on a construction train, and the engineer thereof;⁴⁸ foreman with those under his immediate control;⁴⁹ trackmen and train hands;⁵⁰ master machinist and engineer and fireman;⁵¹ brakeman and train dispatcher.⁵²

§ 363. The same subject continued — Who are fellow servants.

— It is not necessary that the two should be engaged in the same particular work; it is sufficient that the general scope of the employment is the same;⁵³ brakeman and car inspector;⁵⁴ a

⁴¹ Bergstronn v. Staples, 82 Mich. 654 (1890).

⁴² Day v. Toledo &c. Ry. Co., 42 Mich. 523 (1880).

⁴³ Rawley v. Collian, 90 Mich. 31 (1892).

⁴⁴ Bier v. Jeffersonville &c. R. R. Co., 132 Ind. 78 (1892).

⁴⁵ Spencer v. Ohio &c. Ry. Co., 130 Ind. 181 (1891).

⁴⁶ Justice v. Pennsylvania Co., 130 Ind. 321 (1891); Kinney v. Corbin, 132 Pa. St. 341 (1890).

⁴⁷ Clarke v. Pennsylvania Co., 132 Ind. 199 (1892).

⁴⁸ Evansville &c. R. R. Co. v. Henderson, 134 Ind. 636 (1893).

⁴⁹ Capper v. Louisville &c. Ry. Co., 103 Ind. 305 (1885); Boyce v. Fitzpatrick, 80 id. 526 (1881); Drinkout v. Eagle Mach. Works, 90 id. 423 (1883).

⁵⁰ Gormley v. Ohio &c. Ry. Co., 72 Ind. 31 (1880); Collins v. St. Paul &c. R. R. Co., 30 Minn. 31 (1882); Connelly v. Minneapolis &c. Ry. Co., 38 id. 80 (1887); Clifford v. Old Colony R. R. Co., 141 Mass. 564 (1886); Pennsylvania R. R. Co.

v. Wachter, 60 Md. 395 (1883); Schultz v. Chicago &c. Ry. Co., 67 Wis. 616 (1887); Houston &c. Ry. Co. v. Rider, 62 Tex. 267 (1884); Whaalan v. Mad River &c. R. R. Co., 8 Ohio St. 249 (1858); Van Wickle v. Manhattan Ry. Co., 32 Fed. Rep. 278 (1886); Coon v. Syracuse &c. R. R. Co., 5 N. Y. 492 (1851); Sullivan v. Mississippi &c. R. R. Co., 11 Iowa, 421 (1860); Blake v. Maine Central R. R. Co., 70 Me. 60 (1879). *Contra*, Howard v. Delaware &c. Co., 40 Fed. Rep. 195 (1889).

⁵¹ Columbus &c. Ry. Co. v. Arnold, 31 Ind. 174 (1869).

⁵² Robertson v. Terre Haute &c. R. R. Co., 78 Ind. 77 (1881).

⁵³ A "mining boss" and a "driver boss." Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432 (1878); National Tube Works Co. v. Bedell, 96 id. 175 (1880); Keystone Bridge Co. v. Newberry, id. 246 (1880).

⁵⁴ Eaton v. New York &c. R. R. Co., 14 App. Div. N. Y. 20 (1897).

mining boss and a miner;⁵⁵ so with a driver boy employed to haul coal from the chambers of a mine;⁵⁶ one who assists defendant's servants, whether voluntarily or under orders from another;⁵⁷ employes' foremen, bosses in different shops of the same defendant;⁵⁸ a laborer whose duty it was to deliver on the surface at the shaft, and one whose labor was in the tunnel;⁵⁹ the engineer of a sawmill, and the workman of a master machinist repairing the same;⁶⁰ a laborer who employed a chain used for raising locomotive driving-wheels, and the laborer using the chain;⁶¹ the boss or foreman and a deck hand.⁶²

§ 364. The same subject continued — Who are fellow servants.

— Brakemen on the train and the mechanics in the repair shops, the inspector of the rolling stock and the superintendent of the movement of trains;⁶³ captain of a steam tug and a common laborer;⁶⁴ superintendent or manager with employes under his control;⁶⁵ a foreman and a servant under his control;⁶⁶ laborer upon a construction train, and the engineer and con-

⁵⁵ Reese v. Biddle, 112 Pa. St. 72 (1886); Haley v. Keim, 151 id. 117 (1892); Delaware &c. Canal Co. v. Carroll, 89 id. 374 (1879); Redstone Coke Co. v. Roby, 115 id. 364 (1886). Gang boss and laborers. Keystone Bridge Co. v. Newberry, 96 Pa. St. 246 (1880).
⁵⁶ Waddell v. Simonson, 112 Pa. St. 567 (1886).

⁵⁷ Wischam v. Richards, 136 Pa. St. 109 (1890); Flower v. Pennsylvania R. R. Co., 69 id. 210 (1871); Johnson v. Ashland Water Co., 71 Wis. 553 (1888); 77 id. 51 (1890); New Orleans &c. R. R. Co. v. Harrison, 48 Miss. 112 (1873). *Contra*, Street Ry. Co. v. Bolton, 43 Ohio St. 224 (1885).

⁵⁸ New York &c. R. R. Co. v. Bell, 112 Pa. St. 400 (1886).

⁵⁹ McAndrews v. Burns, 10 Vr. 117 (1876).

⁶⁰ Ewan v. Lippincott, 18 Vr. 192 (1885).

⁶¹ Rogers Locomotive Works v. Hand, 21 Vr. 464 (1888).

⁶² O'Brien v. American Dredging Co., 24 Vr. 291 (1891).

⁶³ Wonder v. Baltimore &c. R. R. Co., 32 Md. 411, 418 (1870).

⁶⁴ Baltimore Elevator Co. v. Neal, 65 Md. 438 (1886).

⁶⁵ State v. Matster, 57 Md. 287 (1881).

⁶⁶ Peterson v. Whitebreast Coal &c. Co., 50 Iowa, 674 (1879); Lindvall v. Woods, 41 Minn. 212 (1889); Williams v. Thacker &c. Co., 44 W. Va. 599 (1898). Injuries received by employes while *operating* a railway are controlled by the Code of Iowa, section 1307. The Iowa courts have held that to be within the provisions of the Code the employe must be in some way engaged in work for the purpose of moving and operating trains. Stroble v. Chicago &c. Ry. Co., 70 Iowa, 555 (1886); Foley v. Chicago

ductor;⁶⁷ blacksmith and engineer, fireman and conductor;⁶⁸ locomotive engineers on the same road;⁶⁹ an engineer and servant whose duty it was to take and record the numbers and description of each car coming into the station;⁷⁰ engineer and fireman;⁷¹ a yard foreman and yard inspector of cars.⁷²

§ 365. The same subject continued — Who are fellow servants.

— Employes working together under one common directing superior are fellow servants;⁷³ foremen of two section gangs are fellow servants;⁷⁴ a brakeman of a freight train and the fireman upon another train;⁷⁵ a brakeman in a switch gang and the engineer in charge of the switch engine;⁷⁶ section hands and trainmen of a construction train, where the two groups are independent of each other and work under different foremen, to whose orders they are respectively subject;⁷⁷ a workman in a bridge gang and the workmen in the transportation department;⁷⁸ a roadmaster in charge of a working train and a working party, and a section hand riding thereon;⁷⁹ an engine wiper and night

&c. Ry. Co., 64 id. 644 (1884); Malone v. Burlington &c. Ry. Co., 65 id. 417 (1884); Luce v. Chicago &c. Ry. Co., 67 id. 75 (1885); Matson v. Chicago &c. Ry. Co., 68 id. 22 (1885). There are a number of cases in the Iowa reports decided under this provision of the Code and the statute of 1862. The statute in Kansas is largely a copy of the Iowa statute of 1862. 1 Gen. Stats. of Kan. 1889, par. 1251; Atchison &c. R. R. Co. v. McKee, 37 Kan. 592 (1887). Section boss and engineer not fellow servants. St. Louis &c. Ry. Co. v. Weaver, 35 Kan. 412 (1886). Car repairer and brakeman not fellow servants. Missouri &c. Ry. Co. v. Dwyer, 36 Kan. 58 (1886). Car repairer and train hands not fellow servants. Hannibal &c. R. R. Co. v. Fox, 31 Kan. 586 (1884).

⁶⁷ Miller v. Ohio &c. Ry. Co., 24 Ill. App. 326 (1887).

⁶⁸ Abend v. Terre Haute &c. R. R. Co., 111 Ill. 202 (1884).

⁶⁹ Ohio &c. Ry. Co. v. Robb, 36 Ill. App. 627 (1889).

⁷⁰ Beuhring v. Chesapeake &c. Ry. Co., 37 W. Va. 502 (1892).

⁷¹ Mulligan v. Montana Union Ry. Co., 19 Mont. 135 (1896).

⁷² St. Louis &c. Ry. Co. v. Rice, 51 Ark. 467 (1888).

⁷³ Foster v. Missouri Pacific Ry. Co., 115 Mo. 165 (1892).

⁷⁴ Sherrin v. St. Joseph &c. Ry. Co., 103 Mo. 378 (1890).

⁷⁵ Relyea v. Kansas City &c. R. R. Co., 112 Mo. 86 (1892). They are fellow servants who are so related and associated in their work that they can observe and influence each other's conduct and report delinquencies to a common correcting power.

⁷⁶ Warmington v. Atchison &c. R. R. Co., 46 Mo. App. 159 (1891).

⁷⁷ Parker v. Hannibal &c. R. R. Co., 109 Mo. 362 (1891).

⁷⁸ International &c. Ry. Co. v. Ryan, 82 Tex. 565 (1891).

⁷⁹ Galveston &c. Ry. Co. v. Smith, 76 Tex. 611 (1890).

watchman, when ordered by the yard foreman, in charge of an engine to make a coupling, and the yard foreman;⁸⁰ bridge carpenter and men under his control;⁸¹ engineer and conductor;⁸² a yardmaster and car coupler.⁸³

§ 366. The same subject continued — Who are fellow servants.

— Locomotive engineers employed upon the same railroad, although on different locomotives;⁸⁴ the engineer and fireman of a locomotive and a common laborer, who are all employed by a millowner, in the work of moving lumber cars;⁸⁵ foreman of a roundhouse and employe working under him;⁸⁶ roadmaster and section-men;⁸⁷ section-men and those engaged in running trains;⁸⁸ the one whose duty it is to light a headlight on an engine, and an employe injured upon the track;⁸⁹ baggage master and switchtender;⁹⁰ station agent and engineer;⁹¹ those measuring, sorting and scaling lumber in a millyard, and those engaged in piling lumber;⁹² servants engaged in excavating a trench for a city, and other servants working in connection therewith;⁹³ a

⁸⁰ Gulf &c. Ry. Co. v. Schwabbe, 1 Tex. Civ. App. 573 (1892).

⁸¹ Texas &c. R. R. Co. v. Whitmore, 58 Tex. 276 (1883).

⁸² International &c. Ry. Co. v. Culpepper, Civ. Ct. App., Tex., Jan., 1897. Persons engaged in the service of a railway corporation, foreign and domestic, are controlled in Texas by Laws 1891, chap. 24.

⁸³ Webb v. Richmond &c. R. R. Co., 97 No. Car. 387 (1887).

⁸⁴ Norfolk &c. R. R. Co. v. Donnelly, 88 Va. 853 (1892).

⁸⁵ Watts v. Hart, 7 Wash. St. 178 (1893).

⁸⁶ Gonsior v. Minneapolis &c. Ry. Co., 36 Minn. 385 (1887).

⁸⁷ Brown v. Winona &c. R. R. Co., 27 Minn. 162 (1880).

⁸⁸ Connelly v. Minneapolis &c. Ry. Co., 38 Minn. 80 (1887); Foster v. Minnesota Central Ry. Co., 14 id. 360 (1869).

⁸⁹ Collins v. St. Paul &c. R. R. Co., 30 Minn. 31 (1882).

⁹⁰ Roberts v. Chicago &c. Ry. Co., 33 Minn. 218 (1885).

⁹¹ Brown v. Minneapolis &c. Ry. Co., 31 Minn. 553 (1884).

⁹² Fraser v. Red River Lumber Co., 45 Minn. 235 (1891).

⁹³ Bergquist v. City of Minneapolis, 42 Minn. 471 (1890). The liability of railroad companies for injuries to servants from the negligence of fellow servants is controlled by statute, chapter 13, Laws of 1887, which is largely a copy of the Iowa statute; it does not apply to damages sustained "by any employe, agent or servant while engaged in the construction of a new road, or any part thereof not open to public travel or use." It only applies to those employes engaged in operating railroads. Lavalley v. St. Paul &c. Ry. Co., 40 Minn. 249 (1889); Pearson v. Chicago &c. Ry. Co., 47 id. 9 (1891); Moran v. Eastern Ry. Co., 48 id. 46 (1892).

station agent and train employe;⁹⁴ wiper of engines and trainmen;⁹⁵ conductor of a gravel train and employe engaged in unloading the gravel;⁹⁶ switchman and engineer;⁹⁷ master and mate;⁹⁸ track walker and coal heavers or firemen;⁹⁹ an employe working under a car upon the track, and one whose duty it was to warn him of an approaching train.¹

§ 367. The same subject continued — Who are fellow servants.

— Servants under the same master, in a common service are fellow servants, although they may be engaged in different departments of labor;² an engineer or conductor and those whose duty it is to keep the road in repair;³ those who load a car with lumber with projecting ends, and the operatives upon the train;⁴ the engineer and the train hands, other than the conductor;⁵ a superior who undertakes to perform, and puts himself in posi-

⁹⁴ *Toner v. Chicago &c. Ry. Co.*, 69 Wis. 188 (1887); *Gaffney v. New York &c. R. R. Co.*, 15 R. I. 456 (1887); *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419 (1876).

⁹⁵ *Ewald v. Chicago &c. Ry. Co.*, 70 Wis. 420 (1880).

⁹⁶ *Heine v. Chicago &c. Ry. Co.*, 58 Wis. 525 (1883).

⁹⁷ *Fowler v. Chicago &c. Ry. Co.*, 61 Wis. 159 (1884).

⁹⁸ *Mathews v. Case*, 61 Wis. 491 (1884).

⁹⁹ *Schultz v. Chicago &c. Ry. Co.*, 67 Wis. 616 (1887).

¹ *Luebke v. Chicago &c. Ry. Co.*, 63 Wis. 91 (1885). In Wisconsin the liability of railroad companies for injuries to servants from the negligence of fellow servants is controlled by statute. In 1875 the first act was passed, chapter 173, Laws of 1875; this act was repealed by chapter 232, Laws of 1880; another act was passed in 1889, chapter 438, Laws of 1889; this act was repealed in 1893, and the law now in force was then enacted, which is chapter 220, Laws of 1893, approved April 17, 1893. This later act is somewhat

different from the first two and from most all other statutes of similar import in the other States.

² A second foreman in the machine shop of a cotton mill, with the foreman of the slashing-room. *Brodeur v. Valley Falls Co.*, 16 R. I. 448 (1889).

³ *New Orleans &c. R. R. Co. v. Hughes*, 49 Miss. 258 (1873); *Howd v. Mississippi Cent. R. R. Co.*, 50 id. 178 (1874). In Mississippi liability of railroad corporations for injuries to servants from negligence of fellow servants is controlled by statute. Code 1892, § 3559.

⁴ *Louisville &c. R. R. Co. v. Gower*, 85 Tenn. 465 (1886).

⁵ *Nashville &c. Ry. Co. v. Wheless*, 10 Lea, 741 (1882); *East Tennessee &c. Ry. Co. v. Smith*, 89 Tenn. 114 (1890). The common-law rule is not changed by Code, sections 1166-1168. *East Tennessee &c. R. R. Co. v. Rush*, 15 Lea, 145 (1885). The doctrine that, where employes are in separate and distinct departments of service, the fellow servant rule does not apply, has no application in

tion to perform, the work of a fellow servant is, as to that particular work, a fellow servant, and not that of a vice-principal, although he may be vice-principal generally;⁶ engineers, firemen, brakemen and shovellers on a gravel train;⁷ the machinist in the shop, supervisor of the tracks and the fireman on the locomotive;⁸ a foreman or assistant superintendent and other employes;⁹ the mere foreman of a job and those working under him;¹⁰ a switchman and train operatives;¹¹ engineer and switch-tender.¹²

Tennessee, except as to railroad companies. *Coal Creek Mining Co. v. Davis*, 90 Tenn. 711 (1891).

⁶ *Gann v. Railroad Co.*, 101 Tenn. 380 (1898).

⁷ *Parish v. Pensacola &c. R. R. Co.*, 28 Fla. 251 (1891). Decided prior to the enactment of chapter 3744, Laws of 1887, which was repealed by the enactment of chapter 4071, Laws of 1891. Montana regulated by statute. *Comp. Stats.* 1888, p. 817, § 697.

⁸ *Mobile &c. R. R. Co. v. Thomas*, 42 Ala. 672 (1868).

⁹ *Mobile &c. R. R. Co. v. Smith*, 59 Ala. 245 (1877). See *Tyson v. South. &c. R. R. Co.*, 61 id. 554 (1878). *Employers Liability Act*, Ala., *Stats.* 1886, Code, §§ 2590-2592. Statute construed. *Kansas City &c. R. R. Co. v. Crocker*, 95 Ala. 412 (1891); *Mobile &c. R. R. Co. v. George*, 94 id. 199 (1891); *Seaboard Mfg. Co. v. Woodson*, 94 id. 143 (1891).

¹⁰ *McDonald v. Eagle &c. Mfg. Co.*, 68 Ga. 839 (1882). The liability of railroad companies for injuries caused by the negligence of fellow servants is controlled by statute. Code 1882, §§ 2083, 3036. The injured servant must be free from fault. *Baker v. Western &c. R. R. Co.*, 68 Ga. 699 (1882); *Western &c. R. R. Co. v. Adams*, 55 id. 279 (1875). The Code of Georgia, as construed by the courts, ap-

plies to all servants in the employ of the railroad, and is not restricted, as in Iowa and Minnesota, to those who are engaged in operating trains. *Georgia R. R. &c. Co. v. Miller*, 90 Ga. 571 (1892). This statute is not obnoxious to the fourteenth amendment to the Constitution of the United States, as denying to such companies the equal protection of the laws. *Id.*; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205 (1888). As to servants other than those employed by railroad companies, the common-law rule was adopted in the Code. Code 1882, § 2202; *Krogg v. Atlanta &c. R. R. Co.*, 77 Ga. 202 (1886); *Augusta Factory v. Barnes*, 72 id. 217 (1884); *Atlanta Cotton Factory Co. v. Speer*, 69 id. 137 (1882); *East Tennessee &c. R. R. Co. v. Maloy*, 77 Ga. 237 (1886). Does not apply to one engaged to sweep out the train or like employes. *Id.*

¹¹ *Miller v. Southern Pac. Co.*, 20 Or. 285 (1891); *Slattery v. Toledo &c. Ry. Co.*, 23 Ind. 83 (1864); *Randall v. Baltimore &c. R. R. Co.*, 109 U. S. 478 (1883); *Haryey v. New York &c. R. R. Co.*, 88 N. Y. 484 (1882). Baggage master and switch tender are fellow servants. *Roberts v. Chicago &c. Ry. Co.*, 33 Minn. 218 (1885); *Chicago &c. R. R. Co. v. Henny*, 7 Ill. App. 322 (1880).

¹² *Brown v. Central Pacific R. R.*

§ 368. **Illustrative cases — Who are not fellow servants.**—In the following cases employes have been held not to be fellow servants, within the meaning of the rule: A conductor and engineer;¹³ plaintiff who was employed by a firm of stevedores to load a vessel from defendant's dock; defendant furnished the hoisting apparatus and persons to manage the same; plaintiff was injured through the negligent act of such person; held, they were not fellow servants;¹⁴ train dispatcher and engineer, or other operatives of trains;¹⁵ superintendent of a railroad company and employes;¹⁶ employes of a leased road, and the employes of the company leasing the same, although subject to the orders of the latter company, while running on its tracks;¹⁷ section boss and common laborer;¹⁸ agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule, to be regarded as fellow servants with those who are engaged in operating it;¹⁹ train hand with one who was engineer, superintendent, conductor and master, whose business it was to employ and discharge hands connected with the train.²⁰

Co., 68 Cal. 171 (1885); *Walker v. cago &c. Ry. Co.*, 64 Wis. 475 (1885); *Boston &c. R. R. Co.*, 128 Mass. 8 (1885); *Chicago &c. R. R. Co. v.* (1879); *Naylor v. New York &c. R. McLallen*, 84 Ill. 109 (1876); *Dar-*
R. Co., 33 Fed. Rep. 801 (1888). *rigan v. New York &c. R. R. Co.*,

¹³*Chicago &c. Ry. Co. v. Ross*, 112 52 Conn. 285 (1884); *Pittsburgh &c. U. S.* 377 (1884); explained in *Bal-*
Ry. Co. v. Henderson, 37 Ohio St. timore &c. R. R. Co. v. Baugh, 149 549 (1882).

id. 368 (1893). See *Northern Pa-* ¹⁶*Sheehan v. New York Central*
cific Ry. Co. v. Herbert, 116 *id.* &c. R. R. Co., 91 N. Y. 332 (1883).

642 (1885); *Northern Pacific R. R.* ¹⁷*Phillips v. Chicago &c. Ry.*
Co. v. Peterson, 162 *id.* 346 (1896); *Co.*, 64 Wis. 475 (1885).

id. 359 (1896); *Northern Pacific R.* ¹⁸*Louisville &c. R. R. Co. v.*
R. Co. v. Hambly, 154 *id.* 349 *Bowler*, 9 Heisk. 866 (1872).

(1894); *Central R. R. Co. v. Kee-* ¹⁹*Ford v. Fitchburg R. R. Co.*,
gan, 160 *id.* 259 (1895). 110 Mass. 240 (1872); *Covey v.*

¹⁴*Sanford v. Standard Oil Co.*, *Hannibal &c. R. R. Co.*, 86 Mo.
118 N. Y. 571 (1890). 635 (1885). See *Lawless v. Con-*

¹⁵*Flike v. Boston &c. R. R. Co.*, *necticut River R. R. Co.*, 136 Mass.
53 N. Y. 549 (1873); *Booth v. Bos-* 1 (1883); *Moynihan v. Hills Co.*, 146
ton &c. R. R. Co., 73 *id.* 38 (1878); *id.* 586 (1888). *Employers Lia-*
Sheehan v. New York &c. R. R. *bility Act*, Mass. Stats., chap. 270,
Co., 91 *id.* 332 (1883); *Hunn v.* *Laws* 1870.

Michigan Central R. R. Co., 78 ²⁰*Dobbin v. Richmond &c. R. R.*
Mich. 513 (1889); *Phillips v. Chi-* *Co.*, 81 No. Car. 446 (1879).

§ 369. **The same subject continued — Who are not fellow servants.**— Brakeman and conductor;²¹ conductor, engineer and track repairers;²² foreman in charge of hands repairing freight cars and subordinate in respect to the work being done at the time of the injury;²³ car inspector and brakeman;²⁴ inspectors of premises and machinery and other employes;²⁵ superintendent of the construction of a runway for coal unloading a vessel, and employes;²⁶ a mill foreman, whose duty it is to keep the machinery in repair, and those who use it;²⁷ section foreman and section hand;²⁸ a yardmaster and switchman;²⁹ employes engaged in digging a trench in a lumber yard, and yard foreman;³⁰ inspector of chains, and brakeman on a logging train;³¹ assistant roadmaster and section hands;³² a train dispatcher and track laborer,³³ or a train employe.³⁴

§ 370. **The same subject continued — Who are not fellow servants.**— A foreman of a railroad company, having exclusive charge of men under him, with full authority to direct where they shall work, is not their fellow servant;³⁵ a master mechanic in railway shops, with full authority over the men, machinery and work, in the absence of one superior in authority, is not a

²¹ Lake Shore &c. Ry. Co. v. Spangler, 44 Ohio St. 471 (1886).

²² Dick v. Indianapolis &c. R. R. Co., 38 Ohio St. 389 (1882).

²³ Lake Shore &c. Ry. Co. v. Lavallee, 36 Ohio St. 221 (1880).

²⁴ Brann v. Chicago &c. R. R. Co., 53 Iowa, 596 (1880); Ohio &c. Ry. Co. v. Percy, 128 Ind. 197 (1890); Cincinnati &c. R. R. Co. v. McMullen, 117 id. 439 (1888); Condon v. Missouri Pacific Ry. Co., 78 Mo. 567 (1883); St. Louis &c. Ry. Co. v. Putnam, 1 Tex. Civ. App. 142 (1892); Fay v. Minneapolis &c. Ry. Co., 30 Minn. 231 (1883); Tierney v. Minneapolis &c. Ry. Co., 33 id. 311 (1885); Macy v. St. Paul &c. R. R. Co., 35 id. 200 (1886).

²⁵ Van Dusen v. Letellier, 78 Mich. 492 (1889).

²⁶ Brown v. Gilchrist, 80 Mich. 56 (1890).

²⁷ Roux v. Blodgett Lumber Co., 94 Mich. 607 (1893).

²⁸ Palmer v. Michigan Central R. Co., 93 Mich. 363 (1892).

²⁹ Lytle v. Chicago &c. Ry. Co., 84 Mich. 289 (1890).

³⁰ Sadowski v. Michigan Car Co., 84 Mich. 100 (1890).

³¹ Morton v. Detroit &c. R. R. Co., 81 Mich. 433 (1890).

³² Harrison v. Detroit &c. R. R. Co., 79 Mich. 409 (1890).

³³ McKune v. California Southern R. R. Co., 66 Cal. 302 (1885). Employers Liability Act, Code of California, section 1970, is a declaration of the common law.

³⁴ Lewis v. Seifert, 116 Pa. St. 628 (1887).

³⁵ Louisville &c. Ry. Co. v. Graham, 124 Ind. 89 (1890).

fellow servant of such employes;³⁶ those who are engaged in supplying or keeping appliances, ways or machinery in repair, and those engaged in operating or using them;³⁷ engineer of an incorporated manufacturing company, and one placed in authority over him, whose duty it is to obey the orders of such person;³⁸ a boilermaker in the machine shop of a railroad company, and the engineer of a locomotive;³⁹ those engaged in supplying and maintaining in repair, the premises, ways, appliances and machinery, and those engaged in their use;⁴⁰ a pit boss of a mine, who has authority to tell the men to do certain work or quit, and such men;⁴¹ a railroad laborer employed to unload rails, and the engineer of a locomotive;⁴² a servant employed to keep and put machinery in proper order, and one whose duty it is to use it;⁴³ car inspectors and engineers;⁴⁴ engineer and section foreman.⁴⁵

§ 371. The same subject continued — Who are not fellow servants.— The brakeman on one train, and the conductor of another train;⁴⁶ the foreman of a crew, engaged in driving piles

³⁶ *Taylor v. Evansville &c. R. R. Co.*, 121 Ind. 124 (1889). See *Hoosier Stone Co. v. McCain*, 133 Ind. 231 (1892); *Nall v. Louisville &c. Ry. Co.*, 129 id. 260 (1891).

³⁷ *Louisville &c. Ry. Co. v. Buck*, 116 Ind. 566 (1888); *Cincinnati &c. R. R. Co. v. McMullen*, 117 Ind. 439 (1888).

³⁸ *Blackman v. Thomson-Houston Electric Co.*, 102 Ga. 64 (1897).

³⁹ *Pennsylvania &c. R. R. Co. v. Mason*, 109 Pa. St. 296 (1885). See *New York &c. R. R. Co. v. Bell*, 112 Pa. St. 400 (1886); *Mullan v. Philadelphia &c. Steamship Co.*, 78 id. 25 (1875).

⁴⁰ *Brann v. Chicago &c. R. R. Co.*, 53 Iowa, 597 (1880); *Theleman v. Moeller*, 73 Iowa, 108 (1887). Liability of railways for employes while moving a train. Code, § 1307. See *Schroeder v. Chicago &c. R. R. Co.*, 47 Iowa, 375 (1875); *Stroble v. Chicago &c. Ry. Co.*, 70 id. 555 (1886).

⁴¹ *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57 (1890).

⁴² *Peoria &c. Ry. Co. v. Johns*, 43 Ill. App. 83 (1891).

⁴³ *Tudor Iron Works v. Weber*, 31 Ill. App. 306 (1888); 129 Ill. 535 (1889).

⁴⁴ *Chicago &c. R. R. Co. v. Hoyt*, 122 Ill. 369 (1887).

⁴⁵ *Chicago &c. R. R. Co. v. Moranda*, 108 Ill. 576 (1884); 93 id. 302. The definition of the relation which makes the servants of the same master fellow servants, is law for the court to declare; whether two servants came within the definition, is a fact for the jury to find. *Chicago &c. R. R. Co. v. Kelly*, 127 Ill. 637 (1889); *Chicago &c. Ry. Co. v. Tuite*, 44 Ill. App. 535 (1892).

⁴⁶ *Daniels v. Chesapeake &c. Ry. Co.*, 36 W. Va. 397 (1892).

for trestles for a railroad company, with other men co-operating in building and repairing trestles;⁴⁷ a superintendent and those under his charge;⁴⁸ a foreman and those under him;⁴⁹ a railroad track repairer and a locomotive engineer;⁵⁰ a foreman, who furnishes one of the hands with a defective lever wherewith to propel a car, and the operator of the car;⁵¹ foreman of a round-house and men employed therein;⁵² a foreman of a gang of men engaged in unloading a large stone from a flat car, and such men;⁵³ agent with control over work and with power to employ and dischargemen, and direct their employment, and such men;⁵⁴ master mechanic and wrecking master;⁵⁵ car repairer and foreman;⁵⁶ section master and switchmen;⁵⁷ a laborer in defendant's quarry, having no connection with the train service, and train operatives;⁵⁸ a foreman in charge of laborers moving the roof of a railroad company's building, and such laborers;⁵⁹ a section foreman and sectionmen;⁶⁰ train dispatcher, and conductors and engineers;⁶¹ conductor and foreman over a crew of men engaged in repairing a railroad track, and the members of the crew.⁶²

§ 372. **The same subject continued — Who are not fellow servants.**— A foreman in the repair shops of a railway company, and the men under his control;⁶³ an employe charged with keep-

⁴⁷ Bloyd v. St. Louis &c. Ry. Co., 58 Ark. 66 (1893).

⁴⁸ Foster v. Missouri Pacific Ry. Co., 115 Mo. 165 (1892).

⁴⁹ Hall v. St. Joseph Water Co., 48 Mo. App. 356 (1891); Cox v. Syenite Granite Co., 39 id. 424 (1890).

⁵⁰ Schlereth v. Missouri Pacific Ry. Co., 115 Mo. 87 (1892).

⁵¹ Banks v. Wabash Western Ry. Co., 40 Mo. App. 458 (1890).

⁵² Dayharsh v. Hannibal &c. R. R. Co., 103 Mo. 570 (1890).

⁵³ Higgins v. Missouri Pacific Ry. Co., 43 Mo. App. 547 (1890).

⁵⁴ Stephens v. Hannibal &c. R. R. Co., 86 Mo. 221 (1885).

⁵⁵ Tabler v. Hannibal &c. R. R. Co., 93 Mo. 79 (1887).

⁵⁶ Moore v. Wabash &c. Ry. Co., 85 Mo. 588 (1885).

⁵⁷ Hall v. Missouri Pacific Ry. Co., 74 Mo. 298 (1881).

⁵⁸ Dixon v. Chicago &c. R. R. Co., 109 Mo. 413 (1891).

⁵⁹ Sullivan v. Hannibal &c. R. R. Co., 107 Mo. 66 (1891).

⁶⁰ Schroeder v. Chicago &c. R. R. Co., 108 Mo. 322 (1891). See Hoke v. St. Louis &c. Ry. Co., 88 id. 360 (1885).

⁶¹ Smith v. Wabash &c. R. R. Co., 92 id. 359 (1887).

⁶² Miller v. Missouri Pacific Ry. Co., 109 Mo. 350 (1891).

⁶³ Missouri Pacific Ry. Co. v. Williams, 75 Tex. 4 (1889).

ing a track in repair, and the employes operating a train on such track;⁶⁴ an engineer of one company using the tracks of another company, and the engineer of the company owning such tracks;⁶⁵ section master, train hand and brakeman;⁶⁶ a section foreman charged with keeping the track in repair, and the brakeman on a train;⁶⁷ inspector and car coupler;⁶⁸ engineer and man overhauling a car;⁶⁹ a superintendent or foreman having charge of the construction of a building, and laborers under him;⁷⁰ a brakeman and engineer;⁷¹ foreman in charge of a pile driver, who is charged with the duty of keeping it in repair, and those working thereon;⁷² brakeman and general manager;⁷³ brakeman and train dispatcher;⁷⁴ brakeman and section boss;⁷⁵ an engineer on one train, and the conductor upon another train, and train

⁶⁴ *Missouri Pacific Ry. Co. v. Bond*, 2 Tex. Civ. App. 104 (1893).

⁶⁵ *Texas &c. Ry. Co. v. Easton*, 2 Tex. Civ. App. 378 (1893). Liability of railway corporations for negligence of fellow servants. Laws of 1891, chap. 24, of Texas.

⁶⁶ *Moon v. Richmond &c. R. R. Co.*, 78 Va. 745 (1884). See *Baltimore &c. R. R. Co. v. McKenzie*, 81 id. 71 (1885).

⁶⁷ *Drymala v. Thompson*, 26 Minn. 40 (1879); *Tobran v. Richmond &c. R. R. Co.*, 84 Va. 192 (1887).

⁶⁸ *Tierney v. Minneapolis &c. Ry. Co.*, 33 Minn. 311 (1885). Liability of railroad corporations to one employe, injured by the negligence of another employe, is controlled in Minnesota by statute. Chap. 13, Laws 1887. This statute is limited in its operation to corporations operating railroads. *Lavallee v. St. Paul &c. Ry. Co.*, 40 Minn. 249 (1889).

⁶⁹ *Richmond &c. R. R. Co. v. Norment*, 84 Va. 167 (1887). Whether plaintiff and defendant are co-employes is a question of mixed law and fact to be decided

by the jury under suitable instructions from the court. *Baltimore &c. R. R. Co. v. McKenzie*, 81 Va. 71 (1885).

⁷⁰ *Johnson v. First Nat. Bank*, 79 Wis. 414 (1891). "It is elementary law that the master must furnish a safe place in which he requires his servant to work, and furnish him with safe appliances." *Id.* 421.

⁷¹ *Chamberlain v. Milwaukee &c. R. R. Co.*, 11 Wis. 238 (1860). A switchman making a coupling and the engineer are fellow servants. *Fowler v. Chicago &c. Ry. Co.*, 61 Wis. 159 (1884). Brakeman and engineer are fellow servants. *Nashville &c. R. R. Co. v. Wheless*, 10 Lea, 741 (1882).

⁷² *Schultz v. Chicago &c. Ry. Co.*, 48 Wis. 375 (1879).

⁷³ *Phillips v. Chicago &c. Ry. Co.*, 64 Wis. 475 (1885).

⁷⁴ *Ib.*

⁷⁵ *Hulehan v. Green Bay &c. R. Co.*, 68 Wis. 520 (1887). Railroad companies' liability for injuries to servant in Wisconsin, see chap. 220, Laws 1893; former statutes, chap. 438, Laws 1889; chap. 173, Laws 1875.

dispatcher;⁷⁶ a conductor and fireman;⁷⁷ employes in different departments of service;⁷⁸ a conductor and one employed in coupling cars.⁷⁹

⁷⁶ *Louisville &c. R. R. Co. v.* 3036. The Code in Georgia is not
Cavens, 9 Bush, 559 (1873). restricted to those servants en-

⁷⁷ *East Tennessee &c. R. R. Co.* gaged in operating trains, as in
v. Collins, 85 Tenn. 227 (1886). Iowa and Minnesota. *Georgia &c.*
Engineer and brakeman are fellow R. R. Co. *v. Miller*, 90 Ga. 571
servants. See *Nashville &c. R. R.* (1892).

Co. v. Wheless, 10 Lea, 741 (1882). ⁷⁹ *Mason v. Richmond &c. R. R.*

⁷⁸ *Coal Creek Mining Co. v. Co.*, 111 No. Car. 482 (1892); *Boat-*
Davis, 90 Tenn. 711 (1891). See *wright v. Northwestern R. R. Co.*,
Code of Tenn., §§ 1166-1168; *Code* 25 So. Car. 128 (1886). For a fur-
of Miss. 1892, § 3559. See *Laws* ther list of cases see *Thomas on*
of Fla., chap. 4071, *Laws* 1891; *Neg.*, p. 888; *Beach on Cont. Neg.*
Comp. Stats. Mont. 1888, p. 817, (3d ed.), § 332; *Shearm. & Redf. on*
§ 697; *Code of Ala.*, §§ 2590-2592; *Neg.* (5th ed.), § 233a.

Code of Ga. 1882, §§ 2202, 2083,

PART IV—FORMS—PRACTICE—REQUEST TO CHARGE—CHARGE BY THE TRIAL JUDGE.

CHAPTER XV.

FORMS.

(See PLEADINGS, Chapter 6.)

COMPLAINTS.

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| <p>§ 373. Complaint by a servant against a master.</p> <p>374. The same by one injured at a steam railroad crossing.</p> <p>375. The same by a servant against a master.</p> <p>376. The same by a servant against a master.</p> <p>377. The same by a servant against a master.</p> <p>378. The same by one injured by a wagon on a street.</p> <p>379. The same by a brakeman against a railroad.</p> <p>380. The same by a servant, an infant, against a master.</p> <p>381. Answers.</p> <p>382. Answers — Continued.</p> | <p>§ 386. The same for an injury to a passenger on an electric street car.</p> <p>387. The same against a street railway company, for frightening horses.</p> <p>388. The same for causing a collision.</p> <p>389. The same for causing a collision of a steam car with an electric car.</p> <p>390. The same for causing death at a steam railroad crossing.</p> <p>391. The same for causing a collision.</p> <p>392. The same for an injury to a passenger.</p> <p>393. The same by a guardian of a minor servant, a brakeman.</p> |
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DECLARATIONS.

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| <p>383. Declaration for causing death of a boy at a steam railroad crossing.</p> <p>384. The same for causing death of a boy, while working at dangerous machinery.</p> <p>385. The same for an injury to a passenger on a ferry-boat.</p> | <p>394. The same for ejecting a passenger.</p> <p>395. The same by a servant against a master.</p> <p>396. The same by a passenger of an electric street car.</p> <p>397. The same for a collision at a steam railroad crossing.</p> |
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- § 398. The same by husband and wife, for injuries to the wife, while a passenger.
399. The same by a passenger against a steam railroad.
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401. The same by husband and wife, for injuries to the wife, while a passenger on an electric car.
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404. The same against an electric street railway company.
405. The same for causing a collision.
406. The same by a minor for injuries caused in a collision.
407. The same for causing a collision.
408. The same for injuries received at a public crossing.
409. The same for tearing up a public street.
410. The same against a ferry company.
411. The same by husband and wife, for injuries to the wife, from a fall on the stairs of an apartment-house.
412. The same for negligently placing obstructions on a street.
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417. The same where plaintiff's wife was so much hurt, that after being ill for some time, she died.
418. The same in an action by a brakeman of a railway company against the company.
419. The same by the servant of the purchaser of an elevator against the manufacturer.
420. The same in actions of negligence in Massachusetts — Public Statutes, 1882 — Negligence of railroad corporations — Maryland.
421. The same — Negligence of a town.
422. The same by a servant against a master.
423. The same by husband and wife, for injuries to the wife, by falling into an open areaway.
424. The same for injuries received by falling into an excavation near a street.
425. The same for injuries received on a pier.
426. Form of an indictment against a railroad company for negligently killing a person at a highway crossing.
427. Pleas — General issue — Special pleas — Statute of Limitations — Payment — Release.

§ 373. **Complaint by a servant against a master.**—The complaint of the above-named plaintiff against the above-named defendant shows:¹

I. That the defendant is, and was at the time hereinafter mentioned, a corporation duly organized under the laws of the State of New Jersey, operating a railroad among other places at the point or place where the plaintiff was injured as hereinafter mentioned.

II. That on or about the 4th day of April, 1887, while the plaintiff was employed at Bergen Point, in the State of New Jersey, by the Lehigh Wilkesbarre Coal Company, a corporation of the State of New Jersey, one of the trains of the said Central Railroad Company of New Jersey, the defendant in this action, at the point or place where the plaintiff was so employed, was suddenly started by the said defendant or its agents, without notice or warning to the plaintiff and while the plaintiff was lawfully between two cars of said train; and the plaintiff immediately attempted to extricate himself from said position with due diligence and discretion, notwithstanding which the plaintiff's left foot was caught between two crossing tracks at or near the point of such crossing on one of which tracks said train in part moved; and that the plaintiff's said foot was so run over by said train and thus injured, and the plaintiff was compelled to have and has had said foot amputated, and he has suffered damages by reason of the premises in the sum of \$15,000.

III. That the plaintiff was thus injured solely by reason of the carelessness and negligence of the defendant.

Wherefore, the plaintiff demands judgment against the defendant for the sum of \$15,000, besides costs.

§ 374. **The same by one injured at a steam railroad crossing.**—The above-named plaintiff, by _____, his attorneys, complains of the defendant and alleges:

I. On information and belief that the above-named defendant is a foreign corporation existing under and by virtue of the laws of the State of New Jersey.

¹ For a collection of forms of ing death, see 1 Abb. N. Y. Forms, complaints in actions for negli- 536-538; Abbott's Forms of Plead- ingence under the Code, see 1 Abb. ing, N. Y., chap. 32, pp. 566-685 N. Y. Forms, 440-445, 518. For (1898). forms when the action is for caus-

II. That on or about the 14th day of February, 1895, this plaintiff was struck and run upon by an engine attached to certain cars belonging to defendant and running on defendant's tracks at the village of Perth Amboy, in the State of New Jersey. That when plaintiff was thus struck and run upon, as aforesaid, he was in the act of crossing said tracks at or near a crossing in said village. That while plaintiff was lawfully upon defendant's said track, as aforesaid, the defendant negligently and carelessly ran its said engine and cars against and upon this plaintiff, without giving any warning or notice of the approach of the same, and that plaintiff was knocked down and run over, as aforesaid, a severe injury was inflicted upon his head, and his right foot was broken and crushed, so that an amputation of the same was necessary, and was thereafter performed between the ankle and knee.

III. That by reason thereof the plaintiff was made lame, sore and sick, and became and is permanently disabled and suffered great physical and mental pain, and was confined to his bed for a long period of time, and was prevented from earning his livelihood, and put to great expense for physicians and other costs of cure, all to his damage in the sum of \$25,000.

IV. That there was no negligence on plaintiff's part contributing to the sustaining of his injuries hereinbefore alleged.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$25,000, his damages aforesaid, besides the costs of this action.

§ 375. **The same by a servant against a master.**— The plaintiff complains against the defendant:

I. That the plaintiff is a resident of the city of Brooklyn.

II. On information and belief, that the defendant is now, and at the time of the grievances hereinafter set forth, was a corporation for carrying on a railroad and transportation business, duly incorporated in the State of New Jersey, having offices for the transaction of its business at No. 119 Liberty street, in the city of New York, State of New York, and also owning and controlling and having the entire arrangement of certain piers in Jersey City, projecting into the Hudson river, and known as the Jersey Central Railroad piers, said piers being used by the defendants in the prosecution of their said business.

III. That plaintiff is, by occupation, a grain shoveller, and

was, and at the time of the grievances hereinafter set forth had been working in said capacity for the firm of Edward Annan & Co. That on the 13th day of August, 1890, plaintiff was at work for his said employers in his said capacity on board of a floating grain elevator belonging to them, engaged in loading grain from a canal-boat on the cars of the defendant's road.

That at said time said elevator was made fast to one of defendant's said piers in Jersey City, and said canal-boat was made fast to the side of the elevator away from the pier, the said cars on which the grain was being loaded stood on a track of defendant's said pier. That between said cars and that side of the pier to which said elevator was made fast was another track on which stood empty cars, which were in the control of the defendants, but with which plaintiff and his said employers had nothing to do.

That in loading the grain upon the said cars, it was necessary for the plaintiff, with others, to pass frequently from the elevator to said cars that were being loaded; that for convenient passage from the elevator to said cars, which were being loaded, a space or passage of about six feet had been left between two of the aforementioned empty cars that stood on the intermediate track. That while lawfully going through said passage, through which plaintiff was thus invited to pass, through the carelessness and negligence of the defendant, and through no fault of his own, and without any warning by the defendant, the said empty cars were suddenly and violently forced together, and the said space so suddenly closed, that plaintiff was caught between two cars, thereby being greatly injured, three ribs being fractured, his arm broken and rendered useless, besides sustaining other severe internal injuries.

IV. That by reason thereof, the plaintiff became and for a long time remained, and still is, ill and was for a long time, and still is, prevented from pursuing his business, or any other calling, and suffered, and still suffers, great bodily and mental pain, and was otherwise injured to his damage \$20,000.

Wherefore, the plaintiff demands judgment against the defendant for \$20,000, together with the costs of this action.

§ 376. The same by a servant against a master.— The complaint of the plaintiff above named, by _____, his attorneys,

against the defendant above named, respectfully shows and alleges as follows:

I. That at all the times hereinafter mentioned, the defendant was; and now is, a foreign corporation organized and existing under and in pursuance of the laws of the State of New Jersey, and owning and operating a certain railroad known as the New Jersey and New York railroad, together with the track, cars, station-houses and other appurtenances thereto belonging, and that the plaintiff is a resident of the State of New York.

II. That on or about the 16th day of November, 1890, and prior thereto, the plaintiff was in the employ of the defendant as a carpenter, and that on said last-mentioned day he was lawfully engaged at and under the direction of the defendant in and about the construction and erection of a certain station building for the defendant at the town of Hackensack, in said State of New Jersey.

III. That on or about said 16th day of November, 1890, while so engaged in said employment the defendant negligently and carelessly placed the plaintiff at work upon certain stay-beams used in the erection and forming part of said building, and upon certain boards temporarily and for convenience placed over the same by the defendant, to assist in placing the scaffold beams of said building; that the said place where plaintiff was ordered and directed to work by the defendant, as aforesaid, was dangerous to life and limb and was known to the defendant to be dangerous, and that said stay-beams or one of them which supported the board upon which the plaintiff was compelled to and did stand as directed by the defendant, as aforesaid, were or was weak, defective and wholly unfit for the purpose for which they or it were or was used by the defendant, and that said stay-beams were wholly insufficient in number and too widely separated, the one from the other, for the purpose for which they were used by the defendant, and that the said board upon which the plaintiff was directed by the defendant to stand and did stand, as aforesaid, was insufficiently and improperly supported, all of which was well known to the defendant, but of all which the plaintiff was wholly ignorant. That on said last-mentioned day while the plaintiff was standing on said board, as aforesaid, one of said weak, defective and insufficient stay-beams broke, and in consequence whereof and

because said stay-beams were insufficient in number and too widely separated the one from the other, as aforesaid, the plaintiff, without any negligence on his part, was precipitated from said board and said stay-beam to the floor below, head foremost, and thence through and between the floor-beams of said floor to the cellar of said building, a distance of about twenty-five feet. That by reason of said fall the plaintiff sustained a fracture of both bones of his right leg below the knee and his body was terribly bruised and contused from head to foot, and he was otherwise severely injured; that because of said injuries, sustained, as aforesaid, the plaintiff was confined to an hospital for upwards of four months, and thereafter at his home for more than a month longer; was caused for a long time to remain sick, sore and lame and to suffer severe bodily pain and anguish of mind; was incapacitated from attending to his business and employment and other duties for a long time; and was obliged to undergo medical and surgical treatment. That the plaintiff by reason of said injuries still suffers great pain and anguish and will continue so to suffer, and is incapacitated from attending to his business or to any other employment in the same manner as before receiving said injuries, and that by reason whereof he is still lame; and as plaintiff believes will continue to be lame for the rest of his natural life, whereby, and by reason of all the said premises the plaintiff has suffered damages in the amount of \$10,000.

IV. That the said injuries received and sustained by the plaintiff, as aforesaid, were occasioned, caused and brought about wholly by reason of the carelessness and negligence of the defendant and without any fault, want of care or negligence on the part of the plaintiff.

Wherefore, the plaintiff demands judgment, against the defendant, for the sum of \$10,000, together with the costs of this action.

§ 377. The same by a servant against a master.— The above-named plaintiff, by _____, his attorneys, complains of the defendant and alleges:

I. On information and belief, that the above-named defendant is a foreign corporation, existing under and by virtue of the laws of the State of New Jersey.

II. That on or about the 31st day of August, 1893, the plaintiff was in the employ of said defendant, and on said day plaintiff was lawfully on the track of said defendant, at a railroad crossing near the town of Whiskyhill, Luzerne county, in the State of Pennsylvania, and while lawfully upon said defendant's track, as aforesaid, said defendant negligently, carelessly, unlawfully, and without warning ran one of its engines upon said plaintiff, knocking him down and running over his left foot and crushing the same, necessitating an amputation thereof between the knee and the ankle.

III. That by reason thereof, the plaintiff was made sore and sick, and became and is permanently disabled, and suffered great physical and mental pain, and was confined to his bed for a long period of time, and was prevented from earning his livelihood and put to great expense for physicians and other costs of cure, all of this damage in the sum of \$10,000.

IV. That there was no negligence on plaintiff's part, contributing to the injuries hereinbefore alleged.

Wherefore, plaintiff demands judgment against the defendant for \$10,000, his damages, aforesaid, besides the cost of this action.

§ 378. The same by one injured by a wagon on a street.—The plaintiff complains and, upon information and belief, alleges:

I. That on or about the 2d day of May, 1895, the defendant, above named, was the owner of a certain coal wagon and team of horses, then being driven by said defendant's servant through and along West Fiftieth street, near Tenth avenue, in the city of New York, in the transaction of said defendant's business.

II. That said horses and coal wagon, while being driven through and along said Fiftieth street, near Tenth avenue, as aforesaid, were so negligently and carelessly driven and managed by said defendant's servant, that George H. Keller, without any fault or negligence on his part, and solely through the carelessness and negligence of said defendant's servant, was knocked down and run over by said team and wagon, and the said George H. Keller was thereby so injured as to cause his death almost immediately.

III. That said George H. Keller was, at the time of his

death, a minor, the son of Charles G. Keller, this plaintiff, and said plaintiff expended the sum of \$125 for funeral and other expenses, made necessary by reason of the act of the defendant aforesaid.

IV. That said George H. Keller left no widow, and his only next of kin is his father, Charles G. Keller, who was entitled to his assistance, services and earnings during his minority, and who has sustained pecuniary damage, by reason of his death, in the sum of \$25,000.

V. That said George H. Keller died intestate at said city of New York, and that on the 8th day of May, 1895, letters of administration, upon the estate of George H. Keller, deceased, were duly issued and granted to this plaintiff by the Surrogate's Court of the county of New York, appointing this plaintiff administrator of all the goods, chattels and credits which were of said deceased, and that this plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of said office, and as such he brings this action.

Wherefore, plaintiff demands judgment against the defendant for the sum of \$25,000, besides the costs of this action.

§ 379. **The same by a brakeman against a railroad.**—The plaintiff, by this his complaint, respectfully shows to this honorable court:

I. That plaintiff is informed and believes that the defendant is a domestic corporation, duly organized under the laws of the State of New Jersey, and is a common carrier of freight and passengers, for hire, from one part to others in the State of New Jersey, and is a citizen of said State.

II. That on or about the 7th day of October, 1889, this plaintiff was employed as a brakeman by the defendant in the float yard, at Jersey City, in the State of New Jersey, and that about 2 o'clock in the morning on the 8th day of October, 1889, he was ordered by one of the defendant's conductors to couple cars on to certain other cars in said yard, and that he went in between said cars in a careful manner, in obedience to the said commands of the said conductor, to make said coupling of said cars, and his right foot got caught in a guard-rail, negligently and carelessly left open and unguarded or protected, and of which this plaintiff had no knowledge or notice, and that the said conductor negligently, carelessly and

unskilfully left his position where this plaintiff's position and condition could have been seen by said conductor, in violation of the rules of the defendant, ordered and caused other cars to be cut loose from the remainder of the cars on the same track, while in motion, in violation of defendant's rule, before this plaintiff gave the signal by his lantern, required by the defendant's rules; that the said coupling had been made, and that this plaintiff was in a safe position, and that the cars were so situated, as to grade, and so caused to be moved by the engine as to come towards plaintiff, and that this plaintiff called out and gave notice of his foot being caught to defendant's servants, and for the brakes to be put on to the said car, but that the said conductor negligently and carelessly omitted to have any person at the brakes on the said cars, as required by defendant's rules, and that the plaintiff was caused by the gross negligence of the said conductor in charge of said train, to have his left arm so injured as to cause it to be permanently, almost perfectly, stiff at the wrist, and this plaintiff to lose the power to use his left arm and wrist as he could before said injury, and to have his left leg so crushed and bruised and otherwise injured as to cause the plaintiff to suffer great pain of body, and the said left leg to be permanently injured and so weakened as at times to be unable to support the weight of plaintiff's body, and to cause plaintiff frequently to fall without any premonition; and that plaintiff's right leg was so injured as to require its amputation, a few hours thereafter, six inches above the knee, as was done on the 8th day of October, 1889.

III. That this defendant was negligent in thus failing to have said opening and dangerous guard-rail unprotected and unguarded, and in not giving this plaintiff notice thereof, of all of which dangerous condition as to said guard-rail, the defendant had long, actual and constructive notice. In the employment of an incompetent and grossly negligent conductor, and in a total failure to have their guard-rails properly blocked or guarded, when not in actual use, as was their duty under the law in such cases, made and provided, and as is the common and general use in railroad yards in the several States of the Union, to the knowledge and notice of the defendants, and in their material inspection of apparatus likely to become dangerous from use, and in their failure to repair the same, and in its supervision of its servants and agents in the actual perform-

ance of their work, and in its failure to employ a sufficient number of competent servants, as it was its duty to have done.

IV. That defendant was negligent in not providing proper rules for the guidance of its agents and servants, and in the negligent enforcement of such rules as it had made and provided for the protection of its servants.

V. That this plaintiff is a citizen of the United States, and resides in the city of Brooklyn, in the State of New York, and is a citizen of said city and State.

VI. That this plaintiff, by reason of said injuries, caused by this defendant's negligence, has been permanently injured, and incapacitated from doing as much work or earning as much money as he could and did do before he was so injured by this defendant's negligence. That he is about twenty-one years of age, and was a very strong, active young man, and earned \$2 per day wages. That he has been caused to suffer great pain of body and anguish of mind by the defendant's negligence, all to his damage in the sum of \$50,000.

Wherefore, this plaintiff demands judgment against this defendant, for the relief to which he supposes himself to be entitled, in the sum of \$50,000. and the costs of this action.

§ 380. The same by a servant, an infant, against a master.—
A. B., an infant, by C. D., as her guardian *ad litem*, plaintiff, against E. F., defendant. Complaint.

The plaintiff, complaining of the defendants, alleges:

I. That the plaintiff is an infant under the age of twenty-one years.

II. That on the 7th day of August, 1884, upon application, duly made on her behalf, the said C. D. was, by an order of this court, made by the Honorable X. Y., a judge of this court, appointed the guardian *ad litem* of the plaintiff, for the purposes of this action.

III. That, at the times hereinafter mentioned, the defendants, a corporation duly organized under the laws of this State, were the owners, operators and proprietors of certain machinery, in a building situate and known as numbers — and — King street, in the city, county and State of New York, and such machinery was used and operated by the said defendants for the washing of all kinds of goods and wearing apparel, bleaching, dyeing, cleaning and refinishing every

description of goods and wearing apparel, and the ironing of the same and the process incident to the steam laundry business; and, as such owners, operators and proprietors of said machinery and its appurtenances, in said city and county, on the 26th day of August, 1882, hired and employed the said A. B., an infant, as an employe and servant, to work in and at their said machinery for hire, wages and reward paid by the said defendants to said A. B., in that behalf and for the purposes aforesaid, and in the course of the said defendants' lawful and proper laundry business.

IV. That in said building there was a steam engine and its appurtenances, producing steam power of great force and pressure, which said steam engine and power was then and there used by the said defendants to move and work and was moving and working machinery, mill gearing and belting, which was then and there used and operated by said defendants in the said washing, cleaning and ironing of said goods and wearing apparel, as aforesaid, and the process incident to the said laundry business.

V. That, at the said place and in the said building, there was other certain machinery, mill gearing and belting used in said laundry business, by the said defendants, for the purposes aforesaid, to wit, a large machine known in said business as a "mangler," moving and kept in motion with great force and velocity, and was in motion and kept in motion by means of the steam engine and the power thereof and the mill gearing, machinery and belting aforesaid, and for the uses and purposes aforesaid, by the defendants.

VI. That said steam engine, mill gearing, belting and "mangler" were extremely dangerous and subjected said employe and servant, A. B., to great hazards, risks and dangers of life and bodily injury, by reason whereof the said defendants ought carefully to have guarded, operated and worked the said steam engine, mill gearing, belting and "mangler," they having had and then having full notice of such great risks, dangers and hazards, and being well aware of the premises.

VII. That yet the said defendants, not regarding their duty in this behalf, in that said steam engine, mill gearing, belting and "mangler" were so negligently, carelessly, insecurely and improperly constructed, erected and set up for the purposes and uses, as aforesaid, and the said defendants so negligently, care-

lessly and improperly conducted themselves in and about the premises and in and about the management of supplying of steam power, as aforesaid, and of the improper construction and adaptation of such machinery, mill gearing, belting and "mangler," as aforesaid, and, by the imprudent, careless and negligent manner in which said defendants, by their officers, employes and managers, set to work the said A. B. in their said laundry business, as aforesaid, without any notice, caution or instruction, in an insecure and unsafe place and at insecure and unsafe machinery, being the said steam engine, mill gearing, belting and "mangler," that the said A. B., while using the same for hire and reward, then and there paid by the said defendants to her in that behalf, and without any fault or negligence on her part, and in the course of her lawful and proper use thereof, was exposed and subjected to great and unnecessary dangers and risks, and dangers and risks not contemplated by or required by her employment, of which the said defendants then and there had notice, whereby and by consequence of which the said employe and servant, A. B., was caught and did get her hand and arm entangled in and with the said "mangler," whereby her said hand and arm were mashed, bruised and burned, and were greatly and permanently injured, and that without any fault or negligence on her part.

VIII. That, by reason thereof, the plaintiff, A. B., became and for a long time remained ill, and was obliged to and did expend the sum of \$16 in attempting the cure of herself, and was, for a number of weeks, prevented from pursuing her employment, and was and is otherwise permanently injured, to her damage \$10,000, wherefore said plaintiff demands judgment against said defendants for the sum of \$10,000, besides the costs of this action.

§ 381. **Answers.**— The defendants, by _____, their attorneys, answer the complaint herein and allege:

I. They admit the allegations of paragraph first of the complaint.

II. Defendants admit that on or about the 7th day of October, 1889, the plaintiff was in the employ of the defendants as a brakeman in their float yard at Jersey City, in the State of New Jersey, and they deny each and every of the other allegations of the second paragraph of the complaint.

III. Defendants deny each and every of the allegations of paragraphs third and fourth of the complaint and, on the contrary, they allege that the guard-rail mentioned in the complaint was not open and dangerous, unprotected and unguarded, and that the plaintiff had full notice of its location and condition and of the dangers incident to his employment, and defendants deny that the conductor mentioned in the complaint, as having been employed by them, was grossly negligent, and they deny that they employed an incompetent and grossly negligent conductor, and they deny that they failed to have the said guard-rail properly blocked or guarded when not in actual use, and they deny that it was their duty to guard or block said rail in any manner, and they deny that it is the common and general use in railroad yards in the several States of the Union to guard and block guard-rails, and they deny that it was their duty to guard and block said guard-rail, and they deny that there was any law imposing any duty upon defendants to guard and block said guard-rail when not in actual use, or otherwise, and they deny that they had knowledge and notice of such common and general use, or of any such law; and defendants deny that they failed to make any material inspection of apparatus likely to become dangerous from use, and that they failed to repair the same or to supervise its servants and agents in the actual performance of their work; and they deny that they owed any duty to the plaintiff in that behalf; and defendants deny that they did not provide proper rules for the guidance of its agents and servants, and that they were in any way negligent in the enforcement of such rules, as they had made and provided for the protection of their servants, and they deny that the said conductor did any act in violation of their rules whereby the plaintiff was injured.

IV. Defendants allege that they have no knowledge or information sufficient to form a belief as to the allegations of paragraph fifth of the complaint concerning the citizenship and residence of the plaintiff, and, for the purpose of putting the plaintiff to his proofs, they deny that the plaintiff is a citizen of the United States, and resides in the city of Brooklyn, in the State of New York, and is a citizen of said city and State.

V. Defendants, upon information and belief, deny the allegations of the complaint concerning the character of the plaintiff's injuries, and defendants deny that the plaintiff was injured

or permanently injured by or through any negligence on their part, and by or through negligence on their part has become permanently incapacitated from doing as much work or earning as much money as he could and did do before he was injured, and they deny that he has been caused to suffer great pain of body and anguish of mind by negligence on defendant's part, and that by like negligence he has suffered damage in the sum of \$50,000; and defendants, on information and belief, deny the allegations of paragraph sixth of the complaint, alleging that the plaintiff has been permanently injured and incapacitated from doing as much work or earning as much money as he could and did do before he was injured, and that he has suffered damage in the sum of \$50,000. Defendants allege that they have no knowledge or information sufficient to form a belief as to the allegations of said paragraph, alleging that the plaintiff is about twenty-one years of age, and was a very strong, active young man, and earned \$2 per day as wages, and, therefore, for the purpose of putting plaintiff to his proofs, they deny the said allegations.

VI. Defendants deny each and every of the allegations of the complaint not hereinbefore admitted or denied, and they allege that the injuries and damage alleged by the plaintiff in the complaint to have been suffered by him were not caused by or through any negligence on the part of the defendants, but as defendants are informed and believed, were caused and suffered by his own negligence, by his negligence contributing thereto and the negligence of his fellow servants.

And for a separate and distinct defense to this action, the defendants restate and repeat all the allegations of the foregoing answer as fully as if repeated and restated here at length, and allege:

That at the commencement of this action there was and is now another action pending in the Supreme Court of the State of New Jersey between the same parties as this action and for the same cause as that set forth in the complaint herein, and that an exemplified copy of the record of the said action is hereto annexed, marked Exhibit A, and forms a part hereof.

Wherefore, defendants demand judgment that this action be dismissed and a verdict directed in their favor, with costs. (See § 164.)

The defendant, answering the complaint herein, respectfully shows to the court as follows:

I. He admits the allegations contained in the first paragraph of the complaint.

II. Upon information and belief he denies the allegations contained in the second paragraph of the complaint.

III. He denies any knowledge or information sufficient to form a belief as to each and every allegation in said complaint contained and not hereinbefore specifically admitted or denied, and, therefore, denies the same.

IV. For a further and separate defense the defendant alleges, upon information and belief, that the injuries complained of were caused wholly by the carelessness and negligence of the said George H. Keller, himself, and in no way by negligence on the part of this defendant, his agents or servants.

Wherefore, the defendant asks that the complaint be dismissed, with the costs of this action.

The defendant, above named, answering the complaint of the plaintiff, by _____, its attorneys, respectfully shows to this court:

I. It admits the allegation set forth and contained in paragraph I of the complaint.

II. It admits that on or about the 31st day of August, 1894, the plaintiff was in the employ of this defendant, as alleged in the second paragraph of the complaint, but it denies knowledge or information as to whether or not the plaintiff was lawfully on the track of said defendant at the time and place alleged in the said second paragraph of the complaint, and it denies the remaining allegations set forth and contained in said second paragraph, to-wit: that while lawfully upon said defendant's track, as aforesaid, said defendant negligently, carelessly, unlawfully and without warning, ran one of its engines upon said plaintiff, knocking him down and running over his left foot and crushing the same, necessitating an amputation thereof between the knee and the ankle.

III. It denies knowledge or information sufficient to form a belief as to each and every of the allegations contained in paragraph III of the complaint, and also the allegation contained in paragraph IV of the complaint, and on the contrary alleges,

on its information and belief, that the alleged accident to and damage, if any, sustained by the plaintiff, was caused by his own negligence, his negligence contributing thereto, and the negligence of his fellow servants.

Wherefore, defendant demands that the complaint of the plaintiff be dismissed, with costs.

The defendant, by _____, its attorneys, answers the complaint herein and alleges:

I. Defendant admits the allegations of the first paragraph of the complaint, concerning its incorporation, ownership and operation of the New Jersey and New York Railroad, tracks, cars, station-houses and other appurtenances.

But defendant, on information and belief, denies "that the plaintiff is a resident of the State of New York," and, on information and belief, defendant alleges that the plaintiff was, at the times stated in the complaint and at the commencement of this action, a resident of the State of New Jersey, and that by reason thereof this court has no jurisdiction.

II. Defendant admits that on or about the 16th day of November, 1890, and prior thereto, the plaintiff was employed by it as a carpenter, and on the 16th day of November he was working for defendant as a carpenter in and about the construction and erection of a station building of defendant at Hackensack, New Jersey; and that while so doing the plaintiff by reason of his own negligence, or that of his fellow workmen, fell from a scaffold or beam and received some personal injury; and defendant denies each and every allegation of the complaint which alleges that said fall and injury and consequent alleged damage to the plaintiff was occasioned by negligence of the defendant; and, on the contrary, defendant alleges that the alleged accident, injury and consequent damage to the plaintiff was occasioned solely by the fault and negligence of the plaintiff, and by his negligence contributing thereto, and the negligence of plaintiff's fellow servants.

III. Defendant, upon information and belief, denies each and every of the other allegations of the complaint not hereinbefore admitted or denied.

Wherefore, defendant demands judgment that the complaint be dismissed, with costs.

§ 382. **Answers — Continued.**— The defendant, by _____, its attorneys, answers the complaint herein as follows:

I. Defendant alleges that this court has no jurisdiction of the person of the defendant.

II. Defendant alleges that it has no knowledge or information sufficient to form a belief as to the allegations of the complaint, alleging "that the plaintiff is a resident of the city of Brooklyn," and, therefore, for the purpose of putting plaintiff to his proofs, it denies the said allegations.

III. Defendant admits the allegations of paragraph II of the complaint.

IV. Defendant alleges that it has no knowledge or information sufficient to form a belief as to the allegations of the complaint, alleging that plaintiff is by occupation a grain shoveller, and was and at the times mentioned in the complaint had been working in said capacity for the firm of Edward Annan & Co., and that on the 13th day of August, 1890, plaintiff was at work for his employers in said capacity on board of a floating grain elevator belonging to them, engaged in loading grain from a canal-boat on to cars of the defendant's road; that between said cars and that side of the pier to which said elevator was made fast was another track, on which stood empty cars, which were in the control of the defendant, but with which plaintiff and his employers had nothing to do; that in loading the grain upon the said cars it was necessary for the plaintiff, with others, to pass frequently from the elevator to said cars that were being loaded; that for convenient passage from the elevator to said cars, which were being loaded, a space or passage of about six feet had been left between two of the aforementioned empty cars that stood on the intermediate track, and for the purpose of putting the plaintiff to his proofs the defendant denies the aforesaid allegations.

V. Defendant denies each and every of the allegations of the complaint.

VI. The defendant alleges, on information and belief, that the alleged injury and damage, if sustained, to the plaintiff, was caused by his own negligence, by his own negligence contributing thereto, by the negligence of his fellow workmen and the negligence of other persons over whom the defendant had no direction or control.

Wherefore, defendant demands judgment that the complaint be dismissed, with costs.

The defendants, by _____, their attorneys, answer the complaint herein as follows:

I. They admit the allegations contained in paragraph I of the complaint.

II. Defendants deny each and every of the other allegations contained in said complaint, and they allege that the said accident mentioned in the complaint and alleged injuries and damage to the plaintiff were caused solely by the negligence of the plaintiff and by his negligence contributing thereto.

And for a separate and distinct defense to the matters alleged in said complaint, defendants here repeat all the allegations and denials hereinbefore contained.

III. On information and belief, they allege that at the times mentioned in the said complaint the plaintiff resided in the State of New Jersey and continued to reside there up to on or about the 14th day of November, 1889.

IV. That before and at all times mentioned in said complaint, there was, and now is, in force and effect a statute of the State of New Jersey, where said alleged cause of action accrued — a law, being an act of the Senate and General Assembly of that State, entitled and reading as follows:

“A further supplement to the act, entitled ‘An act respecting railroads and canals.’ (Revision) approved March twenty-seventh, one thousand eight hundred and seventy-four:

“1. Be it enacted by the Senate and General Assembly of the State of New Jersey, that all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any railroad corporation owning or operating any railroad within this State shall be commenced or sued within two years next after the cause of such actions shall have accrued and not after.”

* * * * *

“3. And be it enacted, that this act shall take effect immediately. Approved March 25, 1881.”

And defendant further alleges that said act is known as “Chapter CCIV of the laws of the State of New Jersey for the year 1881.” And that by virtue of the aforesaid act, the alleged cause of action set forth in the said complaint was, at the commencement of this action and now is, barred.

Wherefore, defendants demand judgment that said complaint be dismissed, with costs.

The defendant above named, answering the complaint of the plaintiff, by its attorneys, respectfully shows to this court and alleges:

For a First Defense.

I. It admits that it is a foreign corporation, organized and existing under and by virtue of the laws of the State of New Jersey.

II. This defendant denies knowledge or information sufficient to form a belief as to each and every other of the allegations in the said complaint contained; and further, it expressly denies that the plaintiff was in any way damaged or injured through or by the negligence of this defendant, or of its servants or employes, and on the contrary alleges, upon its information and belief, that the alleged accident to, and damage, if any, sustained by, the plaintiff was caused by his own negligence and his own negligence contributing thereto.

For a Second Defense.

The defendant, restating and reaffirming all the allegations, admissions and denials hereinabove contained, as though the same were here fully and at large set forth, further alleges and respectfully shows to this court:

I. That at and prior to the time of the happening of the alleged accident to the plaintiff, as set forth in the complaint, there was and still is in force in the State of New Jersey a statute providing as follows, namely: "If any person shall be injured by a locomotive engine, car or cars, whilst walking, standing, or playing, on any railroad in this State, or by jumping on or off a car whilst in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover any damages therefor from the company owning or operating the said railroad; provided, however, that this section shall not apply to any person or persons crossing a railroad at any lawful public or private crossing," which said statute is found upon page 920 of the Revision of the Laws of New Jersey, being section 67 of the laws relating to railroads and canals.

II. This defendant further shows that the alleged accident to the plaintiff appears from the complaint herein to have occurred within the State of New Jersey, and it alleges that plaintiff was injured, if at all, by a locomotive engine, car or cars, of or belonging to this defendant, whilst walking or stand-

ing on the railroad of this defendant, and that the plaintiff accordingly under the said statute is deemed to have contributed to the injury, if any sustained by him, and is precluded from recovering any damages therefor from this defendant.

And this defendant further alleges, upon its information and belief, that the alleged accident to the plaintiff did not occur to him while crossing its railroad at any lawful public or private crossing.

Wherefore, this defendant prays that the complaint of the plaintiff be dismissed, with costs.

§ 383. Declaration for causing death of a boy at a steam railroad crossing.—County Circuit Court, of the day of April, 1883.

COUNTY, ss.:

The New York, Lake Erie and Western Railroad Company, the defendant in this suit, was summoned to answer unto A. B., administrator of the goods, chattels and effects which were of C. D., deceased, the plaintiff therein in an action of tort, and thereupon the said plaintiff, by E. F., his attorney, complains for that, whereas the said defendant, to-wit, on the 19th day of January, 1880, at Newark, in said county, was operating a railroad extending from the city of Paterson, in the county of Passaic, through the said county of Essex and city of Newark, to the city of Jersey City, in the county of Hudson, and was engaged in the business of common carriers thereon, which railroad, so running and extending as aforesaid, and running in a northerly and southerly direction, crossed several public streets and highways running in an easterly and westerly direction, in the said city of Newark, among which was the public street or highway in the city of Newark aforesaid, known as Fourth avenue, which was crossed by said railroad at the same grade, near the intersection of said public street or highway with another public street or highway of the said city of Newark, known as Passaic street, and near the Newark passenger station and waiting-rooms of said railroad.

And plaintiff avers that, at the place aforesaid, the said public street or highway known as Fourth avenue as aforesaid, is crossed by a large number of tracks running in the direction aforesaid, belonging to said railroad, and used in connection therewith by the defendant in operating said railroad, and on

which the said defendant placed and moved its engines, coaches, freight and coal cars; and plaintiff avers that the said crossing at the place aforesaid, to-wit, on the day and year aforesaid, was extremely dangerous to persons and vehicles there passing along said Fourth avenue; that the said passenger station and waiting-rooms then were situate on the east side of the said railroad tracks, and persons going to the same in an easterly direction, along the said public street or highway known as Fourth avenue as aforesaid, were prevented from seeing whether trains, engines or cars were moving or being moved on the most easterly of the said tracks of said railroad, at that point, by long lines of freight cars, which were kept standing on the most westerly of the said several tracks, and adjacent to and within the lines of said Fourth avenue; and plaintiff avers that the said defendant could only have made the said crossing safe for the passage of passengers, horses, carriages and other vehicles travelling and going along said Fourth avenue, at the place aforesaid, by providing and causing flagmen and other servants to be thereat stationed, to give warning to persons approaching or passing thereon, and by erecting gates or other obstructions across said Fourth avenue, at said crossing, and keeping the same closed and put up during the passage of said engines, coaches and cars over and upon said railroad, at said crossing, and by ringing a bell or blowing a whistle, which is required by law to be placed on every engine run and operated on said railroad, and rung and blown at and before approaching the said crossing, and by the defendant using every other lawful, safe and prudent method of notifying the public of the approach of said engines, coaches and cars over and upon said railroad, at said crossing.

And plaintiff avers that the said defendant was then and there possessed of a certain locomotive engine, propelled by steam, and of certain carriages, coaches and freight and coal cars, designed to be drawn and propelled by said engine, upon and over the tracks of said railroad, and which were then and there being drawn, moved and propelled by said engine over and upon the said tracks of the said railroad, and which said engine, carriages and cars were then and there under the care, government and direction of a certain then servant or servants of the said defendant, who were then and there propelling and moving the said engine, carriages and cars over and upon the

said tracks of the said railroad, at, near and upon said crossing, in pursuance of and in accordance with certain directions, orders and instructions then and there received and had by such servant or servants of and from said defendant, to-wit, on the day and year aforesaid, at Newark aforesaid.

And plaintiff avers that, on the day and year first aforesaid, at Newark aforesaid, the said C. D. was walking along said public street or highway known as Fourth avenue, as aforesaid, and approaching said crossing, and intending to go upon and across the said tracks of the said railroad to the said passenger station and waiting-rooms of said railroad, and then and there got upon the tracks of the said railroad, at the crossing aforesaid, as he lawfully might, and without any negligence or fault on his part, when the defendant, with its engines, coaches and cars, propelled by steam, approached and came upon said crossing without having given, or caused to be given, any warning of the approach of the said engines, coaches and cars, and without having any flagmen or other servants there stationed, to warn persons of their approach, and without ringing the bell or blowing the whistle, which was then and there placed upon the said engine that was then and there propelling the said coaches and cars, and without having any gates or other obstructions over and across the said street called Fourth avenue, at the place aforesaid, or any other lawful, safe and prudent method of notifying the public of the approach of the said engines, coaches and cars, and the said defendant then and there, by its servants in charge of its said engines, cars and coaches, so carelessly and improperly managed, moved and conducted the same that, by and through the carelessness, negligence and improper conduct of the said defendant, by its servants, in that behalf, one of the said cars of the said defendant then and there ran and struck, with great force and violence, upon and against the said C. D., and, by reason of the bruises, hurts and wounds thereby caused, the said C. D. was so injured that he died, to-wit, on the day and year aforesaid, at Newark aforesaid.

For that whereas, also, the said defendant, to-wit, on the day of January, 1883, at Newark, in said county, was operating a certain other railroad, running and extending from the said city of Paterson, in the said county of Passaic, through the said county of Essex and city of Newark, to the said city of Jersey City, in the said county of Hudson, and was engaged

in the business of a common carrier thereon, which said railroad so running and extending as aforesaid, and running in a northerly and southerly direction, crossed several public streets and highways running in an easterly and westerly direction in the said city of Newark, among which was another public street or highway in the city of Newark aforesaid, known as Fourth avenue, which was crossed by said road at the same grade, near the intersection of said public street or highway with another public street or highway of the said city of Newark, known as Passaic street, and near the Newark passenger station and waiting-rooms of said railroad.

And plaintiff avers that, at the place aforesaid, the said public street or highway, known as Fourth avenue as aforesaid, is crossed by a large number of tracks running in the direction aforesaid, belonging to said railroad and used in connection therewith by the defendant in operating said railroad, and on which the said defendant placed and moved its engines, carriages and freight and coal cars, and plaintiff avers that the said crossing at the place aforesaid, to-wit, on the day and year aforesaid, was extremely dangerous to persons and vehicles there passing along and upon Fourth avenue aforesaid; that the said passenger station and waiting-rooms were situated on the east side of the said railroad tracks, and persons going to the same in an easterly direction along the said public street or highway, known as Fourth avenue as aforesaid, were prevented from seeing whether engines, carriages or cars were moving or being moved on the tracks of the said railroad, by long trains of freight cars kept standing on the most westerly of the said tracks of the said railroad, and by the freight depot of said railroad and the platform erected and placed in front of the same, situated on the westerly side of the said tracks at or near the said crossing.

And plaintiff avers that the said defendant was then and there, possessed of a certain other locomotive engine propelled by steam, and of certain other carriages and cars designed to be drawn and propelled by said engine, upon and over the tracks of said railroad, and which were then and there being drawn, moved and propelled by said engine over and upon the said tracks of the said railroad, and which said engine, carriages and cars were then and there under the care, government and direction of certain other then servant or servants of the said defendant, who were then and there propelling and moving the said

engine, carriages and cars over and upon the said tracks of the said railroad at, near and upon said crossing, in pursuance of and in accordance with certain directions, orders and instructions then and there received and had by said servant or servants from said defendant, to-wit, on the day and year aforesaid, at Newark aforesaid.

And plaintiff avers that on the day and year aforesaid, at Newark aforesaid, the said C. D. was walking along said public street or highway, known as Fourth avenue as aforesaid, and approaching said crossing and intending to go over and across the said tracks of the said railroad to the said passenger station and waiting-rooms of the said railroad, and then and there got upon the track of the said railroad, at the crossing aforesaid, as he lawfully might and without any negligence or fault on his part; and the said defendant, to-wit, on the day and year aforesaid, at Newark aforesaid, by its servants aforesaid, had then and there placed upon the tracks of the said railroad, within and upon the lines of the said street or avenue called Fourth avenue as aforesaid, and upon and over the said crossing, one carriage or car which was then and there standing detached from any other carriage, car or engine of the said defendant, and standing at a great distance, to-wit, 100 feet, from any other said carriage, car or engine of the said defendant; and the said defendant, to-wit, on the day and year aforesaid, at Newark aforesaid, then and there with its engines, carriages and cars propelled as aforesaid, approached and ran against the said carriage or car so standing on the said tracks of said railroad detached from any other carriage, car or engine as aforesaid, and the said defendant then and there, by its servants in charge of the said engines, carriages and cars, so carelessly and improperly managed, moved and conducted the same that, by and through the carelessness, negligence and improper conduct of the said defendant, by its said servants in that behalf, the said engines, carriages and cars struck with great force and violence against, and moved and propelled the said detached carriage or car so standing on the said track as aforesaid, which said detached carriage or car in so being moved and propelled as aforesaid, then and there ran and struck with great force and violence upon and against the said C. D., and by reason of the bruises, hurts and wounds thereby caused, he, the said C. D., was so injured that he died, to-wit, on the day and year aforesaid, at Newark aforesaid.

And plaintiff avers that he, as the father and next of kin and administrator of the effects and chattels of the said C. D., by means of the premises, was forced to pay, lay out and expend, and necessarily did pay, lay out and expend divers large sums of money, to-wit, the sum of \$1,000, in and about the proper, decent and appropriate burial of the said C. D., and that, as the father and next of kin of the said C. D., he has, by reason of the premises, sustained and suffered great loss, injury and damage, to-wit, the sum of \$9,000.

Whereby, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, as administrator of the goods, chattels and effects of the said C. D., for the exclusive benefit of the plaintiff, who is the father and next of kin to the said C. D., deceased,² to demand and have of and from the said defendant the said several sums of money above demanded, in manner and form as is above demanded, and, therefore, he brings his suit, etc.

And the said plaintiff brings into court here the letters of administration granted to the plaintiff of the goods, chattels and effects of the said C. D., deceased, by H. I., the surrogate of the said county of Essex, which give sufficient evidence to the said court here of the grant of administration to the said plaintiff, as aforesaid, the date whereof is a certain day and year therein named, to-wit, the 12th day of April, 1883.

§ 384. The same for causing death of a boy, while working at dangerous machinery.—A. B. and C. D., partners, trading under the name and style of X. Y., the defendants in this suit, were summoned to answer unto E. F., administrator of the goods and chattels, rights and credits, which were of H. I., deceased, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by J. K., his attorney, complains for that, whereas the said defendants, to-wit, on the 17th day of April, 1883, at Jersey City, in said county, were, before and at the time of committing the grievances and injuries hereinafter mentioned, owners, proprietors and operators of a certain building or mill situate on Whiton street, in said city of Jersey City and county aforesaid, used and operated in preparing roots and other substances in the

² See chap. 6, Pleadings, §§ 158, 159.

compounding of drugs, and was engaged in the business of drug milling and in the process incident to the manufacturing of drugs, and, being such owners, operators and proprietors of said drugmill, in said city and county aforesaid, hired and employed the said H. I. as an employe and servant, to work in their said drugmill for hire, wages and reward, paid by said defendants to said H. I., in that behalf and for the purpose aforesaid, and in the course of said defendants' lawful and proper business, in their said drugmill aforesaid. And plaintiff avers that, in said drugmill aforesaid, there was then and there a steam engine, producing steam power of great force and pressure, which said steam engine and power was then and there used to move and work and was moving and working machinery, mill gearing and belting, which said machinery, mill gearing and belting was then and there used and operated in the preparation and manufacturing of drugs and in the process incident to the compounding and manufacturing of drugs as aforesaid. And plaintiff further avers that, at the place and in the building or mill as aforesaid, there was then and there certain other machinery, mill gearing and belting, to-wit, a large shaft or axle moving, and was in motion, with great force and velocity, and was put in motion and kept in motion by means of the steam engine as aforesaid and the power thereof, and the machinery, mill gearing and belting aforesaid, and for the purposes and uses aforesaid. And plaintiff further avers that, at the place and in the building or mill as aforesaid, there was then and there certain other machinery, mill gearing and belting, to-wit, a drug crusher, revolving with great force and velocity, and was put in motion and kept in motion by means of the steam engine as aforesaid, and the power thereof, and by means of the machinery, mill gearing and belting as aforesaid, and for the purposes and uses aforesaid. And plaintiff further avers that said steam engine and power thereof, and said machinery, mill gearing and belting as aforesaid, and said shaft or axle, and said drug crusher, when used and in motion for the purposes and uses as aforesaid, revolved with great force and velocity, and was extremely dangerous, and subjected said employe and servant to great hazards, risks and dangers of life and bodily injury, by reason whereof the said defendants ought carefully to have guarded, operated and worked said steam engine and the power thereof, and said machinery, mill gearing

and belting as aforesaid, and said shaft or axle and said drug crusher; yet plaintiff avers that the said defendants disregarded their duty in this behalf, and that said steam engine, machinery, mill gearing, belting and said shafting and drug crusher were so negligently, carelessly, insecurely and improperly constructed, erected and set up for the purposes and uses as aforesaid, and the said defendants so negligently, carelessly and improperly conducted themselves in and about the premises, and in and about the management of supplying of steam power as aforesaid, that by reason of the premises and of the improper construction and adaptation of such machinery, mill gearing, shafting and drug crusher as aforesaid, and by the improper application of such steam power as aforesaid, and of the imprudent, negligent and careless manner in which said defendants set to work the said H. I. in their manufacturing of drugs as aforesaid, without any caution or instruction, in an insecure and unsafe place, and at insecure and unsafe machinery, the said H. I., while using the same for hire and reward, then and there paid by defendants to the said H. I., in that behalf and without any fault or negligence on his part, and in the course of the lawful and proper use thereof, was exposed and subjected to great and unnecessary dangers and risks, and dangers and risks not required by his employment, whereby and by consequence of which the said H. I. was caught and got entangled with the said shafting, mill gearing, drug crusher, belting and machinery, and was, with great force and violence, whirled and dragged about said shafting, mill gearing, drug crusher, belting and machinery, and by reason of the bruises, hurts and wounds thereby caused, he, the said H. I., was so injured that he died, to-wit, on the day and year aforesaid, at Jersey City as aforesaid; and plaintiff avers that he, as the father and next of kin and administrator of the goods and chattels, rights and credits of the said H. I., by reason of the premises was forced to pay, lay out and expend, and necessarily did pay, lay out and expend, divers large sums of money, to-wit, the sum of \$100, in and about the proper, decent and appropriate burial of the said H. I.; and that as the father and next of kin of the said H. I., he has, by reason of the premises, sustained and suffered great loss, injury and damage, to-wit, the sum of \$10,000.

Whereby, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, as administra-

tor of the goods and chattels, rights and credits of the said H. I., for the exclusive benefit of the plaintiff, who is the father and next of kin to the said H. I., deceased,³ to demand and have of and from the said defendants the said several sums of money above demanded, in manner and form as is above demanded, and, therefore, he brings his suit, etc.; and the said plaintiff brings into court here the letters of administration granted to the plaintiff of the goods and chattels, rights and credits of the said H. I., deceased, by L. M., surrogate of the said county of Hudson, which give sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain date and year therein named, to-wit, the 1st day of May, 1883.

§ 385. The same for an injury to a passenger on a ferry-boat.

—The defendant in this suit was summoned to answer unto A. B., the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by C. D., his attorney, complains for that, whereas the said defendant, to-wit, on the 19th day of December, 1884, at Jersey City, in said county, was running, controlling, managing and operating, under legislative sanction of the State of New Jersey, a railroad, with a ferry and ferry-

³ See chap. 6, Pleadings, §§ 158, three children as next of kin of 159. And plaintiff avers that she, the said A. B., deceased, have, by as administratrix of the goods and reason of the premises, sustained chattels, rights and effects of the and suffered great loss, injury and the said A. B., by means of the premises, damage, to-wit, the sum of \$20,000. Whereby, and by force of the and expend divers large sums of statute in such case made and provided, an action hath accrued to money, to-wit, the sum of \$300, in the said plaintiff, as administratrix of the goods and chattels, and about the proper, decent and appropriate burial of the said A. B. And plaintiff avers that the said rights and effects of the said A. B., A. B., at the time of his death, for the benefit of the said plaintiff left him surviving his widow, C. D. and her said three children (being the widow and next of kin of the (who is the plaintiff in this cause the said A. B., deceased), to demand as administratrix), and the following named three children, as his next of kin, to-wit, F., aged twelve the said several sums of money years; H., aged eleven years, and above demanded, in manner and I., aged seven years; and that the form as is above demanded, and said C. D., as widow, and his said therefore, she brings her suit, etc.

boats at its terminus on the Hudson river, in said city and county aforesaid, and said ferry and ferry-boats were controlled, managed and operated by and in connection and conjunction with said railroad, extending from Exchange place, in Jersey City aforesaid, county of Hudson and State of New Jersey aforesaid, upon, across and over the said Hudson river to Desbrosses street, in the city, county and State of New York, and was engaged in the business of common carriers thereon.

And the said plaintiff complains for that, whereas, on the 19th day of December, A. D. 1884, he went and got into and upon one of the said ferry-boats operated, controlled and managed by the said defendant, at Desbrosses street, in the city, county and State of New York aforesaid, as a passenger of the said defendant, for hire and reward then and there paid by said plaintiff to the officers, managers, agents and servants of the said defendant, to be then and there carried and transported to Exchange place, in the city of Jersey City, county of Hudson and State of New Jersey as aforesaid, upon, over and across the said Hudson river, as, by law, he had a right to do, and as, by law, the said defendant was then and there required, as common carriers, to transport and carry him, the said plaintiff, then and there, without any negligence, imprudence, carelessness or wrong conduct on the part of the managers, agents and servants of the said defendant, and free from injury, hurts, bruises and damage caused by such negligence, carelessness, imprudence and wrong conduct.

The said plaintiff further avers that the said defendant, disregarding its duty in this behalf imposed by law, in that, by its officers, directors and managers, employed and set to work on and upon said ferry, and in, on and upon said ferry-boat, a certain then unfit, negligent, careless and improper servant or servants, under the control, at the direction and with the knowledge of the officers, directors and managers of the said defendant, for hire and reward then and there paid by the said defendant to said servant or servants, and the said servant or servants, in their common and lawful employment, did then and there, and at the time aforesaid, with the knowledge, at the direction and under the control of the officers and managers and directors of the said defendant, wrongfully, negligently, carelessly, improperly and unjustly, for hire and reward then and there paid by said defendant to said servant or servants,

run, operate, propel and manage said ferry and ferry-boat in which said plaintiff was a passenger and traveller, then and there, for hire and reward paid by said plaintiff to said defendant, and the said servant or servants, at the slip, pier or bridge at Exchange place, in said city of Jersey City and county aforesaid, did then and there wrongfully, negligently, carelessly, unjustly and improperly let down, open and close up the gates on the forward end of said ferry-boat, which were then and there used to warn passengers and travellers and to prevent and keep passengers and travellers from going, departing or falling off of said ferry-boat before the said ferry-boat was properly chained, secured and made fast to the bridge, pier, dock or slip of said ferry-boat, and when an opening or wide space was then and there and did then and there exist between the bridge, pier or dock and the said end of the said ferry-boat, and by so letting down, opening and closing up the gates on the said end of said ferry-boat, on which said plaintiff was then and there a passenger, did then and there invite and give notice to travellers and passengers on said ferry-boat that said ferry-boat was properly chained, secured and made fast to the bridge, pier or slip of said ferry, and that it was safe, prudent and proper for said passengers and travellers to go, depart and leave said ferry-boat on and upon said bridge, pier or dock.

And plaintiff further avers that after said gates were then and there closed up, opened and let down, he, the said plaintiff, attempted to go, depart and leave said ferry-boat, but in consequence of and by reason of the negligence, carelessness, imprudence and wrong conduct of the officers, servants, agents and employes of the said defendant, in letting down and closing up the gates of the said ferry-boat, when a wide space and opening did then and there exist between the said ferry-boat and the said pier as aforesaid, he, the said plaintiff, did then and there, in attempting to go, depart and leave said ferry-boat, fall into and upon the said opening and space then and there left between the said ferry-boat and the bridge, pier or dock, before said ferry-boat was properly chained, secured and made fast to the said bridge, pier or dock, and without any notice or warning given by the said servants of the said defendant that it was not safe to leave said ferry-boat, without any negligence or fault on his part, by reason of and in consequence of which he, the said plaintiff, was then and there greatly injured, maimed, bruised,

hurt, cut, wounded, sick and sore, and, by reason of the premises, he has sustained and suffered great loss, injury and damage, to-wit, the sum of \$5,000, in consequence of which a right of action hath accrued to said plaintiff, and therefore, he brings his suit, etc.

§ 386. **The same for an injury to a passenger on an electric street car.**— The defendant in this suit was summoned to answer unto _____, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by _____, his attorney, complains, for that whereas the said defendant, on the 18th day of August, 1894, at the city of Paterson, in the county of Passaic and State of New Jersey, owned and operated a street railway in and through and along the public street or highway known as North Straight street, extending in a northerly and southerly direction, upon which said railway the cars of the said defendant were then and there run and propelled by electricity or by means of what is known as the trolley system, which said railway and the tracks thereof intersected and crossed certain other public streets or highways running in an easterly and westerly direction, among which was a certain public street or highway known as North Main street; that the said railway and cars propelled as aforesaid were then and there used and employed by the said defendant for the carriage and conveyance of passengers between different points in the city of Paterson, for hire and reward to the said defendant in that behalf, and the said defendant being such owner and proprietor of the said railway and of the said cars propelled thereon as aforesaid, and of one certain car in particular, received into the said last-mentioned car the said plaintiff, as a passenger therein, to be carried through North Straight street to North Main street, in the said city of Paterson, where it crosses or intersects the same; and that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and upon the said car propelled along the said railway as aforesaid; yet the said defendant not regarding its duty in that behalf, did not use due and proper care, that the said plaintiff should be safely and securely carried and conveyed in and upon said car and said railway, but wholly neglected so to do, and by its servants and employes, having caused the said car in which

the said plaintiff was a passenger, as aforesaid, to be brought to a stop or standstill at the intersection of North Main street and North Straight street, to permit the said plaintiff and other persons, who were passengers thereon, to alight from the said car, as was the custom of persons travelling on said railway, conducted itself so carelessly, negligently and unskillfully in this behalf, that by and through the carelessness, negligence and unskillfulness of the said defendant and the servants and employes, the said car upon which the said plaintiff was then and there a passenger, as aforesaid, was caused and permitted suddenly to start and move forward along the tracks of the said defendant at a rapid rate of speed, without notice or warning to the said plaintiff and before the said plaintiff had sufficient time to alight and while he was in the act of alighting from the said car, by means whereof the said plaintiff, then being therein and about to alight from the said car, was by the sudden motion of the said car thrown upon the ground with great violence and was greatly cut, bruised and wounded and divers bones of the body of the said plaintiff were then and there broken, insomuch that the said plaintiff thereby then and there became and was very sick, sore, lame and disordered for a long space of time, to-wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain, and was hindered and prevented from carrying on his lawful and necessary affairs and business and thereby lost divers large gains and profits which otherwise would have been enjoyed by him, and also was forced and obliged to and did then and there lay out and expend divers large sums of money in and about the curing and endeavoring to cure the said last-mentioned cuts, bruises and wounds, and has been and is, by means of the premises, otherwise greatly injured, to the damage of the said plaintiff, \$10,000, and, therefore, he brings his suit, etc.

§ 387. **The same against a street railway company, for frightening horses.**— The _____, a street railway corporation, organized under the laws of the State of _____, the defendant in this suit, was summoned to answer unto _____, the plaintiff therein, in an action of tort, and thereupon the plaintiff by _____, his attorneys, complains:

For that, whereas, heretofore, to-wit, on the 11th day of August, 1895, at _____, in the county of _____, there was,

and from thence hitherto has been, and still is, a certain common and public highway for all persons to go, return, pass and repass, in and by and with horses and wagons and other carriages at their free will and pleasure; and the said defendant then and there was operating a street railway upon said highway and was engaged in transporting for hire, persons in cars which it caused to be propelled along rails and tracks belonging to it and maintained by it upon said public highway, and the said defendant then and there unlawfully and without warrant of law propelled along said highway, upon the said rails and tracks, a vehicle carrying water, having appliances by means of which the said water could be thrown upon the said tracks and rails for the benefit of the said defendant; which said vehicle was of great size and of unusual color and shape, whereby a certain horse of the plaintiff, drawing a certain carriage of the plaintiff, with the plaintiff therein, then and there lawfully passing along said highway, was frightened so that the said horse overturned the said carriage so that the plaintiff was thrown out of the said carriage, and by means thereof was severely bruised, wounded, cut and injured and suffered great bodily pain, and was put to great expense for nursing and doctor's services and medicines, on account of the said injuries.

And the plaintiff avers that he was then engaged in the business of a dry goods purchasing agent, and then and for a long space of time hitherto he was in receipt of large sums of money from his said business, and that by reason of his said injuries he was unable to engage in the pursuit of his said business for a long space of time thereafter; to-wit, for three weeks.

And for that, whereas, heretofore, to-wit, on the 11th day of August, 1895, at _____, in the county of _____, there was, and from thence hitherto has been and still is, a certain common and public highway for all persons to go, return and pass and repass, in and by, and with horses and wagons and other carriages at their free will and pleasure; and the said defendant then and there was operating a street railway upon said highway and was engaged in transporting for hire, persons in cars, which it caused to be propelled along rails and tracks belonging to it and maintained by it upon said public highway, and the said defendant then and there unlawfully and without warrant of law propelled along said highway, upon the said rails and tracks, a vehicle carrying water, having ap-

pliances by means of which the said water could be thrown upon the said tracks and rails for the benefit of the said defendant; which said vehicle was of great size and of unusual color and shape, so that it was probable it would frighten horses that were upon said highway if the said vehicle was not used and propelled in a careful manner, which the defendant then and there well knew; and it thereby became the duty of the defendant to use the said vehicle on the said highway in a careful manner, so as not unnecessarily to frighten horses then and there lawfully being upon the said highway.

Yet the said defendant, neglecting its duty in that behalf, propelled and used the said vehicle in a careless manner, and colored it a bright yellow color and unnecessarily placed upon the front part of the said vehicle a large black cloth or other substance.

Whereby a certain horse of the plaintiff, drawing a certain carriage of the plaintiff, with the plaintiff therein, then and there lawfully passing along said highway was frightened so that the said horse overturned the said carriage and the plaintiff was thrown out of said carriage and by means thereof was severely bruised, wounded, cut and injured and suffered great bodily pain, was put to great expense for nursing and doctor's services and medicines on account of the said injuries. And the plaintiff avers that he was then engaged in the business of a dry goods purchasing agent, and then and for a long space of time hitherto was in receipt of large sums of money from his said business, and that by reason of his said injuries he was unable to engage in the pursuit of his said business for a long space of time thereafter, to-wit, for three weeks.

And the plaintiff says that by reason of the premises he has been injured and has suffered damage in the sum of \$10,000.

And, therefore, he brings his suit, etc.

§ 388. The same for causing a collision.— The _____, a corporation, the defendant in this suit, was summoned to answer _____, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by _____, his attorney complains:

For that, whereas, the said defendant on the 26th day of April, 1895, was the owner and possessor of a certain passenger car which was operated, propelled and run along by electric power, in and upon certain railway tracks, in the possession and

under the control and management of the said defendant, said tracks being situated upon and extending along Springfield avenue, a public street or highway in the city of _____, in the county of _____ aforesaid, and it thereby became and was the duty of the said defendant to use due and proper care in the use, management and control of said passenger car while being operated, propelled and run along said public street or highway and upon said tracks, as aforesaid, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and to use due and proper care in operating, propelling and running said car along said public street or highway, so as to avoid colliding with or running into persons lawfully driving along or crossing said public street or highway, and to operate, propel and run said car at such a rate of speed as to keep the same within safe and proper control. Yet the said defendant, not regarding its duty in that behalf, did not use due and proper care in the use, management and control of said passenger car, while said car was being operated, propelled and run along said public street or highway so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and did not use due and proper care in operating, propelling and running said car along said public street or highway, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and did not operate, propel and run said car at such a rate of speed so as to keep the same within safe and proper control, but wholly failed and neglected so to do. And the said defendant did, on the day and year aforesaid, at _____, in the county of _____, aforesaid, by its servants, so carelessly, negligently and improperly operate, propel and run said car in, upon and along said public street or highway and upon said tracks, as aforesaid, and at such a high rate of speed, so as to lose the safe and proper control of the same, and thereby then and there collided with and ran into a certain truck, which was then and there being lawfully pulled along said public street or highway by a team of horses attached to said truck, in which the said plaintiff was then and there lawfully sitting and driving along, and crossing said public street or highway, with such force and violence as to throw said plaintiff off of said seat and upon said street or highway, whereby the plaintiff's leg was broken, his ribs crushed

and his shoulder dislocated, also thereby seriously, painfully and permanently bruising, wounding and injuring the said plaintiff so that his life was despaired of. And also by means of the premises the said plaintiff became sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, from thence hitherto, during all of which said time the said plaintiff suffered and underwent great pain, and in the future will suffer and undergo great pain, and was hindered and prevented, and in the future will be hindered and prevented from transacting and attending to his necessary and lawful affairs, by him during all that time to be performed and transacted, and lost and was deprived of and in the future will lose and be deprived of divers great gains, profits and advantages which he ought and otherwise would have derived and acquired, and thereby, also, the said plaintiff was forced and obliged to lay out and expend divers large sums of money, amounting in the whole to the sum of \$300; in and about endeavoring to be cured of said wounds, bruises and injuries so received, as aforesaid, at _____, in the county of _____, aforesaid.

Wherefore, the said plaintiff says that he is injured, and has sustained injuries, to the amount of \$15,000, and, therefore, he brings his suit, etc.

§ 389. The same for causing a collision of a steam car with an electric car.—The New Jersey Electric Railway Company, the defendants in this suit, were summoned to answer unto the New York and Greenwood Lake Railway Company, the plaintiffs therein, in an action of tort, wherein the plaintiffs demanded the sum of \$2,000, and thereupon the said plaintiffs, by _____, their attorneys, complain:

For that, whereas, heretofore, to-wit, on the 2d day of September, 1895, to-wit, at Little Falls township, in said county, the said plaintiffs were a corporation, duly organized under the laws of the State of New Jersey, and were engaged in the business of operating and maintaining a certain steam railroad extending from Jersey City, in said State, to Greenwood Lake, in said State, and running partly through the township of Little Falls, in said county, by means of locomotives and cars propelled by steam over and along said steam railroad, aforesaid, and across a certain public highway, with electric railroad track

thereon laid, which crossing was known as the Singac crossing, and which said highway and electric railway track cross the said steam railroad track at a level at the place aforesaid; and that at the time and place aforesaid, the defendants were a corporation organized and existing under the laws of said State, and were then possessed of a certain electric railway track laid along and through said public highway, and across the said steam railroad tracks of said plaintiffs at a level at the place aforesaid; and the said defendants were then and there engaged in the business of operating and propelling electric cars over and along said electric railway and said public highway, and over and across said steam railroad track and roadbed of the plaintiffs at a level at the crossing aforesaid; and plaintiffs aver that it then and there became and was the duty of the said defendants, by their servants and agents, at any and all times, when an electric railway car was about to cross the steam railroad track of said plaintiffs at the crossing aforesaid, to prevent the locomotives and cars of said plaintiffs, then being moved and operated upon said steam railroad track, from striking such electric railway car, or from being struck by the same, and for that purpose it was the duty of said defendants, by their servants and agents, at any time when such electric railway car was about to cross such steam railroad track, to carefully look and listen for the approach of any locomotive or cars of said plaintiffs, before moving or causing to be moved any electric car over and across the steam railroad tracks of said plaintiffs at the crossing aforesaid, yet the said defendants, disregarding their duty in this behalf, to-wit, on the day and year last aforesaid, to-wit, at Little Falls, in said county, carelessly, negligently and recklessly, and when a locomotive, with cars thereto attached, then approaching said crossing was plainly visible, by their servants and agents, moved and propelled an electric car of said defendants, up to and upon the railroad track of said plaintiffs, and in front of a locomotive and cars thereto attached, operated by said defendants, then rapidly approaching, without looking or listening, or taking any other precaution to learn of the approach of said locomotive and cars, and then and there negligently and recklessly caused said electric car to be upon said track at the crossing aforesaid, directly in front of said approaching locomotive and cars, then moving rapidly and at a rate at which it was impossible to stop the same before striking such electric

car, whereby and because of such carelessness and negligence, said locomotive and cars, although carefully managed and controlled by the plaintiffs, by their servants and agents, struck an electric car, and said locomotive was then and there derailed and thrown down a bank, and said plaintiffs' roadbed and track was torn up and destroyed and the cars attached to said locomotive were injured and broken and the plaintiffs' roadbed obstructed and their business of operating the same interrupted for a long space of time, to-wit, one day, and passengers then upon said train were compelled to turn back, and the plaintiffs were compelled to return them their passage money, to-wit, the sum of \$500, and were compelled to lay out a large sum of money, to-wit, the sum of \$1,000 in and upon the repair of such cars, roadbed and tracks, and were otherwise greatly injured and damaged in their property and business aforesaid.

Wherefore, the plaintiffs say that they are injured and have sustained damages of \$2,000, and, therefore, they bring their suit, etc.

§ 390. The same for causing death at a steam railroad crossing.

— John G. McCullough and Eben B. Thomas, receivers of the New York, Lake Erie & Western Railroad Company, appointed by order of the United States Circuit Court, for the Third Circuit, in the District of New Jersey, the defendants in this suit, were summoned to answer _____, administratrix of all and singular the goods and chattels, rights and credits, moneys and effects, which were of _____, deceased, in an action of tort, and thereupon the said _____, administratrix, as aforesaid, by _____, her attorney, complains:

For that, whereas, on the 14th day of September, in the year of our Lord, 1894, and for a long time before that date, the defendants, as such receivers, as aforesaid, were in possession and had the management and control of the said New York, Lake Erie & Western Railroad and of certain locomotive engines and cars used by it for the carriage and conveyance of passengers, goods and chattels in, upon and along the said railroad, from a certain place, to-wit, the city of Paterson, in the county of Passaic and State of New Jersey, to a certain other place, to-wit, the city of Jersey City, in the county of Hudson and State aforesaid, the said railroad crossing and running through certain streets, avenues and public highways, whereby,

and by reason whereof, it became and was the duty of the said defendants to take and use due and proper care and skill in and about the handling, managing and driving of the said locomotive engines and cars along the said railroad; yet the defendants, disregarding their said duty in that behalf, did not use due and proper care and skill in and about the handling, managing and driving of the said locomotive engines and cars along the said railroad, but heretofore, to-wit, on the 14th day of September, in the year of our Lord, 1894, so negligently and unskillfully handled, managed and drove a locomotive engine and a train of cars attached thereto upon and along the said railroad and across a certain public highway, known as and being Washington avenue, in the township of Franklin, in the said county of Essex and State aforesaid, along and upon which said avenue the said William E. Hill was then lawfully driving; that the said locomotive engine and train of cars were driven and struck against the said William E. Hill with great violence, whereby, and by reason of the wounds and injuries thereby occasioned to him, the said William E. Hill, afterwards, and within twelve calendar months next before this suit, died, leaving him surviving the plaintiff, who was before, and at the time of his death, his wife, and Albert C. Hill and Edith M. Hill, who before, and at the time of his death, were his children and next of kin, to the damage of the plaintiff, as such administratrix, \$20,000.

Wherefore, the plaintiff, as administratrix, as aforesaid, and for the benefit of herself and of the children and next of kin of the said William E. Hill, and according to the statute in such case made and provided, brings this suit, etc.

And the said plaintiff brings here into court letters of administration, granted to her on the estate of the said William E. Hill, deceased, whereby it fully appears to the said court that the said plaintiff is administratrix of the said William E. Hill, deceased, etc.

§ 391. **The same for causing a collision.**— The defendant in this suit, then and at all the times hereinafter named, being a corporation duly created, organized and existing pursuant to an act of the legislature of the State of New Jersey, approved March 14, 1893, entitled “An act to authorize the formation of traction companies for the construction and operation of street

railways, or railroads operated as street railways, and to regulate the same," and the several acts amendatory thereof and supplemental thereto, was summoned to answer _____, plaintiff, in an action of tort, and thereupon the said plaintiff, by _____, his attorney, herein complains:

For that, whereas, heretofore, to-wit, at Jersey City, in the county of Hudson aforesaid, the said defendant, then and now, being a corporation duly created, organized and existing, as aforesaid, and operating a line or lines of street railway between various points, and upon and through certain streets and thoroughfares and public highways of Jersey City, aforesaid, and on or about the 31st day of March, in the year 1894, unlawfully and wrongfully and negligently, without any fault or negligence on behalf of this plaintiff, propelled a car or motor, then owned and operated and controlled by said defendant, at the place aforesaid, which said car or motor was then and there in the custody, management and control, and then and there was managed and controlled by said defendant, its agents or servants, and then and there, at or near, the junction of Grand street and Monmouth street, in said city of Jersey City, in said county of Hudson, said defendant, its agents or servants, with great force and violence, negligently and carelessly managed, controlled and propelled the said car or motor, upon and against and into collision with a wagon or vehicle, then being drawn by a pair of horses and driven by said plaintiff, who then and there was seated upon the said wagon or vehicle, and who, in the ordinary course of his legitimate business, then and there was lawfully driving on that part of the public highway or street, dedicated to that use, and while crossing Grand street, at the place aforesaid, by means of which collision of the said car or motor with the said wagon or vehicle, upon which said plaintiff was then and there seated, plaintiff was violently thrown then and there with great force and violence from the said wagon or vehicle downward and upon the street or pavement, and was bruised, maimed, lamed, wounded, paralyzed, shocked, sick and sore, by means of which, without any negligence or fault on his part, plaintiff sustained great mental and bodily injuries, as aforesaid, then and there suffered and still suffers great bodily pain, mental anxiety, nervous shock and general physical disability, and by means of all the foregoing the plaintiff ever since the date last aforesaid, has been prevented from transact-

ing his lawful business and concerns or any other business, totally incapacitated from labor of any kind, physical or mental, and by means of the premises for a long time was and still is confined to his house and bed, and was compelled to pay and incur and has paid and incurred large sums of money for board, lodging, care of physician and medicine, and has sustained damage by reason of all the foregoing, at _____, in the county of _____, aforesaid, in the sum of \$10,000, and therefore, he brings his suit, etc.

§ 392. **The same for an injury to a passenger.**—The _____, a body corporate, the defendant in this suit, was summoned to answer unto _____, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by _____, his attorneys, complains for that, whereas, heretofore, to-wit, on the 30th day of September, 1894, at the city of Philadelphia, in the State of Pennsylvania, to-wit, at Jersey City, in the county of Hudson aforesaid, the said defendant was operating a steam railroad between the said city of Jersey City, in the county of Hudson aforesaid, and the city of Washington, in the District of Columbia, for the carriage of passengers and freight, and on the day and year last aforesaid, at Jersey City aforesaid, received the said plaintiff upon one of its mail and passenger trains then being run upon the said railroad, in a car attached to said train, and undertook and agreed to transport the plaintiff from the station of the said railroad company in the said city of Jersey City to the station on said road known as Washington, in the District of Columbia, for a certain hire and reward to the defendant in that behalf for the transportation of the plaintiff on said train and car. Whereupon it became and was the duty of the said defendant to carry the said plaintiff on its said road in safety, and with due and proper care, yet the said defendant, by its servants and agents, so negligently, carelessly and unskillfully managed the operation of said railroad, that the said train, shortly after leaving the station on the railroad of the defendant at the city of Philadelphia, to-wit, at Jersey City aforesaid, came into collision with a locomotive engine, causing the car in which the plaintiff was, to be crushed, and the said plaintiff was by reason thereof caught between the end of said car, which had been forced in by the said collision, and the corner of a rack in the said car, causing the plaintiff to

sustain severe contusions, and while endeavoring to extricate himself he was struck violently on the forehead and knocked down by the side of the said car falling in upon him by reason of such collision; and the said plaintiff then and there became wrenched, wounded, bruised and disordered, and was then and thereby forced to and did lay out and expend divers large sums of moneys in attempting to be cured, and was thereby then and there hindered and prevented from attending to his necessary business and affairs, to-wit, at Jersey City, in the county of Hudson, in the State of New Jersey aforesaid.

Wherefore, the said plaintiff says he is injured and has sustained damage to the amount of \$2,000, and thereupon he brings his suit, etc.

§ 393. The same by a guardian of a minor servant, a brakeman.

— The was summoned to answer unto , by , his guardian, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by , his attorney, complains:

For that, whereas, heretofore, to-wit, on the 16th day of November, in the year 1887, at Wayne, in the county of Passaic, to-wit, at Newark, in the county aforesaid, was in possession and had the management and control of a certain railroad, with its tracks and appurtenances, and was engaged in the business of a common carrier of passengers and freight thereon; and while then and there running, managing and operating its said railroad, did then and there hire and employ divers large numbers of servants and employes to work, run, manage and operate its said railroad, as incident to its business as aforesaid, for hire and reward then and there paid by the said defendant to the said servant or servants.

And whereas, to-wit, on or about the 16th day of November, in the year 1887, the said Timothy O'Connell was then and there hired and employed as an employe and servant, and in the capacity of a brakeman, by the said defendant; and while then and there so employed, and in the capacity aforesaid, he was then and there set to work making connection between two freight cars, controlled, operated and run by the said defendant over its said railroad.

That the cars upon which the said Timothy O'Connell was then and there set to work, in his proper and lawful capacity as brakeman, were then and there extremely dangerous, and

subjected said employe and servant then and there to great hazards, risks and danger of life and bodily peril, by reason whereof the said defendant, well knowing the premises, ought then and there carefully to have constructed, inspected and operated the said cars, and the machinery and appliances incident and necessary to its proper running, and the proper application and adaptation of its machinery and appliances.

Yet the defendant disregarded its duty in this behalf in that the said cars were then and there, with their construction, machinery and appliances, so negligently, carelessly, insecurely, improperly and defectively constructed, inspected, operated, managed and run, for the purposes and uses aforesaid, and the said defects in and about the construction, inspection and use of the said cars, and its appliances and machinery, were then and there so latent and hidden that the said Timothy O'Connell, while so employed then and there as a brakeman, and while then and there exercising due care and precaution, did not know and could not see the said defects and hidden dangers in and about the construction of the said cars and their machinery and appliances in and about the use and wear and tear of the said car and its machinery and appliances so as aforesaid, but that the said defects and dangers were then and there known to the defendant; and that the defendant did then and there so negligently, carelessly and improperly conduct itself in and about the premises and in and about the management, construction and inspection of the said car and its appliances and machinery as aforesaid; and that the defendant then and there employed and set to work upon said cars certain unfit, careless and improper servants, who, in their common employment, at the time aforesaid, with the knowledge and at the direction and under the control of the said defendant, wrongfully, negligently, carelessly and improperly ran, operated and managed the said cars; the said plaintiff being then and there unaware that such servants were unfit, incompetent and improper, as aforesaid.

That the said defendant then and there set and allowed to be set to work the said Timothy O'Connell in the capacity of brakeman as aforesaid, without any caution or warning as to the hidden dangers and defects, and the unfitness and incompetency of its servants, in an insecure and unsafe place, and at insecure and unsafe machinery and appliances, the said Tim-

othy O'Connell, through no fault or negligence on his part, and while in the act of making the connection between two of the said defendant's freight cars, was caught between said freight cars, his right hand was greatly injured, wounded, maimed, mangled and cut, insomuch that it became and was necessary to have it amputated, and he was otherwise severely injured, wounded, maimed, mangled, cut, hurt and bruised, and then and there became and was very sick, sore and crippled for life, and was otherwise permanently incapacitated from pursuing his customary occupation and earning his livelihood as before receiving the said injuries, and has been forced and obliged to, and did then and there pay, lay out and expend divers large sums of money in procuring medical treatment and attendance.

Wherefore, the said plaintiff saith that he is injured and has sustained damage to the amount of \$25,000, and, therefore, he brings his suit, etc.

§ 394. **The same for ejecting a passenger.**—The _____, the defendant, was summoned to answer unto _____, the plaintiff therein, in an action of tort, and thereupon the plaintiff, by _____, his attorney, complains for that the said defendant, on the 31st day of December, A. D. 1891, was, before and at the time of the committing of the grievances and injuries hereinafter mentioned, in the city and county of Camden, State of New Jersey, was operating a railroad, extending from the city of Camden in the county of Camden through the said counties of Camden, Gloucester, Cumberland and Atlantic, and by and along various platforms and stations on its said route for the receiving and delivering of passengers thereon and therefrom and by the station of Clementon in the county of Camden, and was engaged in the business of common carrier thereon, which railroad so running as aforesaid ran from its platform and station at the west terminal of Kaigs avenue in the city of Camden to its platform or station at Clementon for the landing of passengers.

And the said defendant, on the day and year last aforesaid, were the common carriers of passengers and goods over and along its said railroad from the city of Camden, in the county of Camden, to the city of Atlantic City within this State, and a great many intermediate points, as well as at Clementon Station, by means of carriages and coaches drawn by locomotives

propelled by steam aforesaid for the reward to the defendant in that behalf, and thereupon the plaintiff, at the request of the defendant, became and was a passenger and was received safely by the defendant in one of their carriages, to be by them safely and securely carried and conveyed thereby from the city of Camden to the station of Clementon and to be delivered at its station on the platform thereof, in a safe and careful manner, for reward to the defendant in that behalf, to-wit, the sum of fifty cents. And thereupon it became and was the duty of the defendant to carry the plaintiff as aforesaid from the city of Camden to the station of Clementon, and there to deliver the plaintiff safely and securely; yet the said defendant, disregarding its duty in that behalf, did, on the 31st day of December, A. D. 1891, to-wit, at Camden and within the jurisdiction of this court, wrongfully and tortiously, with force and arms, with great violence, the train being first stopped at a short distance from the station at Camden, for the purpose and acting under the direction of the defendant by its agents, then and there present, doing and directing the acts of defendant, carried, dragged and threw plaintiff from and off the carriage or coach of defendant, in which plaintiff was a passenger by virtue of his reward paid to the defendant in that behalf as aforesaid and without any justification or excuse on the part of defendant, whereby plaintiff was prevented from reaching his destination (home) on the said the 31st day of December, A. D. 1891, and lost the consortium of his wife and family, as he otherwise would have done, and was hurt bruised and wounded by the violent treatment of the defendant, by its agents aforesaid, and was sick, sore and disabled for some days as the result of said bruises and wounds, and plaintiff was injured in his dignity by the acts of defendant aforesaid, and lost the value of his trip ticket, and other injuries, to his damage \$5,000, and, therefore, he brings his suit.

§ 395. **The same by a servant against a master.**—The _____, the defendant in this suit, and a body corporate, was summoned to answer unto _____, the plaintiff therein, upon an action sounding in tort, and thereupon the said plaintiff, by _____, his attorney, complains for that, whereas, the said defendant, to-wit, on the 7th day of November, 1893, at or near the village of Lodi, in the county of Bergen, was operating, managing and

controlling a certain factory and shop for the culture and preparation of silk for the market, and that then and there the said defendant had this plaintiff in its employ and service for hire and reward; and while then and there so employed, he was then and there set to work, and was then and there at work by the order and direction of this defendant upon a perch or elevated platform of small dimensions, which said perch or platform was supported from beneath by a platform or car on wheels or rollers, so arranged and constructed as to be moved from one place to another about the said factory for the uses and purposes of the defendant, and that it was in the line and course of this plaintiff's employment and duties in said employment to so stand as aforesaid on the top of said perch or platform and reach out from said perch or platform and move the structure on which he stood, as aforesaid, from place to place about the said factory, and that the said structure was arranged and intended to be moved by reaching out as aforesaid, from the high perch or platform by securing hold of various ropes and the beams and ceilings and thus pushing or pulling this structure about as aforesaid, and that it was in the line and course of the plaintiff's employment and duties in said employment, to hang, place, arrange, sort, shift, and otherwise dispose of skeins, links and bands of silk in various stages of manufacture or process, and that said silken stuffs, bands and skeins were suspended from the ceiling of the said factory of the defendant in which this plaintiff was employed as aforesaid. And plaintiff avers that in the said course of his employment, and in the line of his duties, this plaintiff was obliged to lean out and over the edge of the perch or top platform on which he stood, and in order to protect him from falling, as the defendant was in duty bound to do, a guard or railing several feet higher than the said top platform or perch, extended about it, and in order to perform his duties and reach the bands and skeins of silk and to move the platform car, this plaintiff was obliged to lean and rest a large part of his weight against said railing and guard in order that he might properly and reasonably perform his duties in said employment. That it was the duty of the defendant to provide this plaintiff with proper tools and appliances, with a safe place in and on which to do his work, and in divers other ways to guard and protect this plaintiff in the proper performance of his duties from any danger, mis-

hap, disaster or accident that might arise from said defendant's negligence or imprudence. And that said plaintiff further avers that the said car and platform on which he was then and there at work in his proper and lawful capacity, and for hire and reward then and there paid to him, was then and there, by reason of the oversight and negligence of the defendant, extremely dangerous and subjected this plaintiff as said employe and servant then and there to great hazards, risk and dangers of life and bodily injury, by reason whereof, the said defendant, well knowing the premises, ought then and there carefully to have constructed, inspected and operated the said car and the machinery and appliances incident and necessary to its proper running and the proper application and adaptation of its machinery and appliances. And the plaintiff avers that the said defendant did then and there disregard its duties in this behalf, in that the said car was then and there, with its machinery and appliances so carelessly, negligently, insecurely and improperly and defectively constructed and inspected, erected, run, operated and managed for the purposes and uses aforesaid, and the said defects in and about the construction, inspection and use of the said car and platform and appliances and machinery were then and there so latent and hidden that the said plaintiff, while so employed then and there and while then and there exercising due care and precaution, did not know and could not see the said defects and hidden dangers in and about the construction of the said car, platform, machinery and appliances, and in and about the use, wear and tear of the said car, platform, machinery and appliances so as aforesaid; and that the said defects and dangers were then and there known to the defendant, and by law the said defendant was bound to know the said dangers and defects so then and there as aforesaid. And plaintiff avers that, at the place and on or about the time aforesaid, the defendant carelessly, negligently and imprudently acted and otherwise misbehaved itself in failing to provide this plaintiff with the proper tools, appliances and safeguards for his work, and that by reason of such negligence, carelessness and misbehavior of defendant, and by reason of defects in said railing and guards, and in various other defects of this defendant's appliances, tools and machinery, which said defendant knew and was bound to know, the guard or railing aforesaid gave away and precipitated this plaintiff a distance

of many feet to the floor below, and grievously hurt, maimed and injured his limbs and body, and he thereby sustained grievous internal injuries; and that at said time and place this plaintiff was properly, cautiously and diligently performing his duties in his said employment and in no manner contributed to his said fall and injuries; but that said fall and injuries were solely due to this defendant's negligence and carelessness. And plaintiff avers that by said fall and injuries he sustained great pain and anguish, still suffers and will, as he is advised by his physician, continue to suffer for a long time; and that he was, and still is, and will be, prevented from the performance of his duty and from the earning of a livelihood for himself and family, and was, is, and will be deprived of the enjoyment of his health and strength; and that he was forced to pay, lay out, and expend and necessarily did pay, lay out and expend, divers large sums of money for nursing, medicines and for other matters incidental to and arising from his said injuries; and that by reason of his sufferings and injuries and loss aforesaid, he has sustained and suffered loss and damage, to-wit, the sum of ten thousand dollars (\$10,000), and plaintiff, therefore, demands that he have of and from the defendant the sum of money above mentioned, and, therefore, he brings his suit, etc.

§ 396. **The same by a passenger of an electric street car.**—The _____, the defendant in this suit, was summoned to answer unto _____, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by _____, his attorney, complains for that, whereas, the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, was and still is a corporation duly incorporated under the laws of the State of New Jersey, and was then running and operating a street railroad of electric motor cars in the county of Hudson aforesaid, from the courthouse and the southern or courthouse terminus of the North Hudson County Railway Company, in Jersey City, to and beyond Fifty-fourth street in the city of Bayonne, in and along divers public streets and avenues in each of said cities, including Ocean avenue and Fifty-third street in Jersey City, and by way of the junction of Communipaw avenue and Grand street in Jersey City, on and by a transfer of passengers at said junction, from one of said motor cars going about east on said Communipaw avenue to another of said cars running

about south on said Grand street, and for one single fare from said courthouse or terminus to said Fifty-fourth street, the transfer being good on such single fare to ride on such car so going on Grand street only for a limited time after being transferred from such car so going from said terminus and on Communipaw avenue, the said defendant then and there so running and operating said railroad and said cars for hire, and then and there commonly carrying passengers thereon for hire.

And, whereas, said plaintiff, on the 4th day of January, 1895, at the special invitation and request of the said defendant, and for the mutual accommodation and profit of said plaintiff and defendant, became and was a passenger upon one of the said cars so run and operated by said defendant at or near said courthouse, for the purpose of riding on said railroad and of being carried safely and securely on said cars, by such transfer, from said terminus to said Fifty-fourth street for the said certain fare or reward by the plaintiff to said defendant in that behalf then and there duly paid; and said plaintiff having arrived at said junction, alighted from the said car on which he was a passenger as aforesaid, and waited at said junction to take, on his transfer as aforesaid, such other car so going along said Grand street; that the weather was bitter cold then and there, and that said defendant did not then and there provide for its passengers so transferred, while then and there waiting for the car to which they were so transferred, any shelter from the weather or elements; that the first car so running on Grand street, which came along after plaintiff had so alighted, was so crowded, both inside and on the platform, that it was impossible for plaintiff to board the same; that plaintiff was poorly clad, and that the said limited time during which said transfer was good for such single fare was about expiring when the next car so running on said Grand street came along, which also was so crowded that it was impossible for plaintiff to get inside of said car, and very difficult for him to even get standing room on the platform thereof, when and where said plaintiff was invited and received by said defendant as a passenger on said last car to stand on the platform thereof, together with many others so invited and received as passengers to so stand then and there, and said defendant then and there took and collected from plaintiff his said transfer ticket or coupon for such ride on said platform; and said plaintiff being then and there engaged in smok-

ing tobacco was invited and received by said defendant as a passenger on said last car to stand and ride on the platform thereof, with many others so invited and received as passengers to so stand and ride then and there, as said defendant was accustomed for a long time theretofore to invite and receive persons so smoking tobacco as passengers to stand and ride on the platforms of said cars; and said defendant then and there took and collected from plaintiff his said transfer ticket or coupon for such ride on said platform. Whereupon it became and was the duty of said defendant to use due and proper care that said plaintiff should be safely and securely carried on said car to his place of destination aforesaid; yet, the said defendant, not regarding its duty in that behalf, did not use due and proper care that the said plaintiff should be so safely and securely carried, but wholly neglected so to do, and so neglected to furnish and assign a safe and suitable place for plaintiff to ride on said car, and by its servants and agents who then and there had the care and management of said car, while said car was proceeding slowly around a curve in the track of said railroad in turning or after turning from Ocean avenue into Fifty-third street aforesaid, and while plaintiff was so riding on the rear platform of said car in a careful manner and without any warning to said plaintiff, although it was usual to give warning to passengers riding on the platform of the danger in going around a curve in said railroad, the said defendant so suddenly quickened the speed of said car that it gave a sudden, unusual, unnecessary and violent jerk, and thereby threw him off said car and upon the ground, and thereby knocked him senseless and greatly broke, bruised, maimed and lacerated his face and other parts of his head and hands, hips, knees, shoulders, back and other parts of his body, to-wit, at Jersey City, in the county of Hudson aforesaid.

By means whereof the said plaintiff has almost entirely lost his hearing, and became and was sick, sore, lame, crippled and disordered, and suffered great pain and anguish of body and mind, and became and was from thence hitherto, and now is, and ever more during his natural life will be, greatly injured in his head, hearing, back, shoulders, knees and other parts of his body and limbs, and thereby hindered and prevented from pursuing his ordinary affairs and business, from which he had hitherto been accustomed to earn large sums of money, and

would but for said injuries now and continually hereafter earn and receive large sums of money, to-wit, \$20 per week; and has also expended, and will in future have to expend, large sums of money in and about endeavoring to be cured of his said injuries, to-wit, \$500; wherefore, said plaintiff saith he hath been injured and suffered damages to the sum of \$10,000.

And, therefore, he brings his suit, etc.

§ 397. **The same for a collision at a steam railroad crossing.**—The _____, the defendant in this action, was summoned to answer _____, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by _____, his attorneys, complains for that, whereas, the said defendant heretofore, to-wit, on the 11th day of January, in the year 1893, at the township of Bridgewater, in said county of _____, was in the possession, management and control of a certain railroad, which was then and there maintained by said defendant, in such manner and location as that the same then and there crossed a certain public highway called Vosseller avenue, then and there being upon the same level with said highway and so that persons approaching said railroad on said highway in vehicles drawn by horses were prevented by a certain natural bank of earth of great height, to-wit, of the height of fifteen feet, and by certain trees and fences then and there being near to the said railroad and to the said highway, from seeing any locomotive which might be approaching said crossing on said railroad from a certain direction soon enough to avoid being struck thereby, upon and over which said railroad certain locomotives were then and there accustomed to be propelled and driven by steam power with great rapidity, by and with the permission and consent of the said defendant, across the said highway from the said direction in which the view from said highway of such approaching locomotives was then and there obstructed as aforesaid. Yet the said defendant so negligently and insufficiently managed and governed said railroad and guarded the said highway crossing, and suffered and permitted said locomotives to be driven and propelled over said railroad and across said highway from the direction aforesaid without proper signals and warnings; that by reason of such negligent management, government and guarding as aforesaid, the said plaintiff, while lawfully passing along the said highway in a certain sleigh drawn by a certain horse on the

day and year aforesaid, at Bridgewater township aforesaid, and then and there lawfully attempting to cross said railroad at said crossing and without any negligence on his part, being then and there unable to see, by reason of the obstructions of view aforesaid, a certain locomotive, which was then and there approaching said crossing on said railroad from the direction aforesaid with great speed and velocity, and not knowing of the approach of the same for want of warning or notification thereof, the said horse and sleigh of the said plaintiff were then and there struck by said locomotive so then and there approaching on said railroad from the direction aforesaid, and thereby not only the said horse of the said plaintiff of great value, to-wit, of the value of \$300, was killed, and the said sleigh of the said plaintiff of great value, to-wit, of the value of \$100, and the harness of the said plaintiff of great value, to-wit, of the value of \$50, were broken and wholly destroyed, but also the said plaintiff was thrown and precipitated with great force and violence from the said sleigh to and upon the earth and stones, railroad ties and rails then and there being, and was by means thereof greatly cut, bruised and wounded in and about his head, limbs and body; and thereby the said plaintiff suffered and underwent, and still does suffer and undergo, great pain and agony, and was for a long space of time, to-wit, from thence hitherto and in the future will be hindered and prevented from attending to his lawful business and affairs as he otherwise might and would have done, and also the said plaintiff was in consequence thereof compelled to lay out and expend divers large sums of money, to-wit, \$500, in and about the effort to be healed and cured of his said injuries, to-wit, at the township of Bridgewater aforesaid.

Wherefore, the plaintiff saith that he is injured and hath sustained damage to the amount of \$25,000, and, therefore, he brings suit, etc.

§ 398. The same by husband and wife, for injuries to the wife, while a passenger.—The _____, a corporation duly organized under and by virtue of the laws of the State of New Jersey, was summoned to answer _____ and _____, her husband, the plaintiffs therein, in an action of tort, and thereupon the said plaintiffs, by _____, their attorney, complain, for that, whereas, the said defendant, before and at the time of the making of

their promise and undertaking, as hereinafter next mentioned, was the owner and was in possession of a certain locomotive engine, with cars thereto attached, and which were managed by the defendant and its agent, running and passing from a certain place, to-wit, from Hoboken, in the county of Hudson, to a certain other place, to-wit, at Roseville station, in the city of Newark, in the county of Essex and State of New Jersey, for the carriage and conveyance thereby of passengers for a certain reasonable hire and reward to the said defendant in that behalf, to-wit, at Hoboken, in the county of Hudson, to-wit, at Newark, in the county of Essex aforesaid, and thereupon, heretofore, to-wit, on the 29th day of November, in the year 1894, at Hoboken, in the county of Hudson aforesaid, in consideration that the said Sarah A. Perret, one of the plaintiffs herein, at the special instance and request of the said defendant, would take and engage a place and seat in its said passenger car to be attached to the said locomotive engine as aforesaid, to be carried and conveyed in and by said car from Hoboken aforesaid to Roseville station at Newark aforesaid, at and for a certain reasonable hire and reward, to-wit, the sum of fifteen cents, to be, therefore, paid by the said Sarah A. Perret to the said defendant in that behalf; it, the said defendant, then and there undertook and faithfully promised the said Sarah A. Perret to safely carry and convey her in and by the said car from Hoboken aforesaid to Roseville station at Newark aforesaid, and that due and proper care should be observed and taken in and about the carrying and conveying as aforesaid, and that said defendant provide a safe and secure place or platform in which the said Sarah A. Perret could safely and securely alight from said car at the end of her said journey, to-wit, at Roseville station in the city of Newark aforesaid, when said car had first stopped for that purpose.

And the said Sarah A. Perret in fact saith that she, confiding in the promise and undertaking of the said defendant, did afterwards, to-wit, on the day and year aforesaid, at Hoboken aforesaid, take and engage a place and seat in the said car to be carried and conveyed in and by the said car from Hoboken aforesaid, to Roseville station in the city of Newark aforesaid, and did then and there pay to the said defendant the sum of fifteen cents, the same being a reasonable hire or reward to the said defendant for the carriage and conveyance of the said Sarah

A. Perret as aforesaid, and although she, the said Sarah A. Perret, confiding in the said promise and undertaking, afterwards, to-wit, on the day and year aforesaid, to-wit, at Hoboken aforesaid, to-wit, at Newark aforesaid, become and was such passenger in and by the said car from Hoboken aforesaid, to Roseville station in the city of Newark aforesaid; yet the said defendant, not regarding its said promise and undertaking, so by it made in manner and as aforesaid, but contriving and fraudulently intending, craftily and subtly to deceive, defraud and injure the said Sarah A. Perret in this behalf, did not, nor would, use due and proper care, skill and diligence in and about carrying and conveying the said Sarah A. Perret in and by the said car from Hoboken aforesaid to Roseville station at Newark aforesaid, and did not use due and proper care in providing a safe and secure place or platform on which the said Sarah A. Perret could safely and securely alight from said car at Roseville station in the city of Newark aforesaid, when said car had first stopped for that purpose, but then and there wholly neglected and failed so to do; and on the contrary thereof the said defendant by its servants so carelessly, improperly, negligently and unskillfully ran and managed the said locomotive engine and cars that afterwards, and when said car had stopped at Roseville station at Newark aforesaid, to-wit, on the day and year aforesaid, that by and through the mere carelessness, negligence and misconduct of the said defendant, and in providing a safe and secure place and platform on which the said Sarah A. Perret could safely and securely alight from said car at the end of her said journey, and when she was about to alight from the platform of the said car, she, without any fault or negligence on her part, fell from said car to and upon the ground, whereby she, the said Sarah A. Perret, was severely and permanently injured, bruised and wounded, causing a rupture in her left side, and her back and left thigh were permanently injured and she disabled for life, whereby she became sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, hitherto, and now is and in the future will be sick, sore, lame and disordered, during all which time she, the said Sarah A. Perret, suffered and underwent great pain, and in the future will suffer and undergo great pain, and was and still is and in the future will be hindered and prevented from transacting and performing her necessary affairs and business.

by her during all that time to be performed and transacted, to-wit, at Hoboken in the county of Hudson, to-wit, at Newark in the county of Essex aforesaid, to her damage \$10,000.

And also by means of the premises the said Andrew Perret, plaintiff, husband of the said Sarah A. Perret, during all that time, hitherto lost and was deprived of the company, aid and assistance of the said Sarah A. Perret, his wife, which he might and would otherwise have had, and the said Sarah A. Perret, as by reason of her said injuries, became permanently disabled from rendering and affording to the said Andrew Perret, in the future, that aid, comfort and assistance in and about his household and domestic affairs, that she otherwise could and would have done. And thereby also the said Andrew Perret lost the services and assistance of the said Sarah A. Perret, his wife, for a long space of time, to-wit, from the day and year aforesaid, up to and until the present time; and thereby also the said Andrew Perret was obliged to and did devote and consume a large amount of time in attendance upon his said wife, and also by reason of the premises the said Andrew Perret was obliged and forced to lay out and expend the sum of \$500, in and about endeavoring to cure his said wife of her said bruises and injuries aforesaid, to-wit, at Hoboken in the county aforesaid, to-wit, at Newark in the county of Essex aforesaid, to the damage of the said plaintiff of \$5,000.

And, therefore, they, the said Sarah A. Perret and Andrew Perret, her husband, bring their suit, etc.

§ 399. The same by a passenger against a steam railroad.—
The _____, a corporation created and existing under and by virtue of the laws of the State of New York, the defendant in this cause, was summoned to answer unto _____, the plaintiff herein, in an action of tort; and thereupon the said plaintiff, by said _____, his attorney, complains, for that, whereas, the said defendant, before and at the time of committing the grievance hereinafter next mentioned, was a railroad company engaged in the business of carrying and transporting freight and passengers as common carriers from Jersey City in the county of Hudson, to and through Kearny in said county, and from and between divers other places; and being so engaged in the said business, to-wit, on the 16th day of November, in the year 1895, in the evening, after dark, of that day, at Jersey City

aforesaid, received into a certain passenger coach attached to a train of cars of said defendant, moved and operated by it, the said plaintiff as a passenger therein, to be carried and transported therein by said defendant from Jersey City aforesaid to a station called West Arlington in the said township of Kearny, for certain fare and reward, to-wit, the sum of five (\$5) dollars theretofore paid by the plaintiff for commuting or being daily carried or transported on the trains of said railway company back and forth between the said station called West Arlington and Jersey City aforesaid, from the 1st day of November, A. D. 1895, to the 30th day of November, 1895; and by reason thereof, it then and there became and was the duty of the defendant to have conveyed, or caused to be conveyed, the said plaintiff in the said passenger coach from Jersey City aforesaid to said West Arlington station, and to have provided proper and sufficient steps, platform, lights and means and facilities whereon and whereby the plaintiff might have safely alighted at the said station of West Arlington, yet the said defendant, not regarding its duty in that behalf, so carelessly, negligently and unskillfully conducted itself in that behalf that by and through the carelessness, negligence and default of said defendant and its servants and for want of due care and attention to their duty in that behalf, no proper station platform, no sufficient steps and no proper and sufficient lights were provided at said station of West Arlington when the said train carrying the said plaintiff arrived there, by means whereof the said plaintiff, while, with due care and without negligence on his part, attempting to alight or descend from the said passenger coach at the said station, to-wit, on the day and year last aforesaid, fell a great distance to the ground and was thereby stunned and rendered unconscious, and while the plaintiff was so lying on the ground the said train started and the wheels thereof passed over his right foot and he was thereby greatly cut, bruised and wounded, and divers members of his body were then and there grievously injured, insomuch that his right leg was necessarily amputated, and he then and there became and was very sick, weak and disabled for a long period, to-wit, from thence to the commencement of this suit, and was permanently injured in his body, limbs and health, and was then and there forced to pay out and expend and did necessarily pay out and expend a large sum of money, to-wit, the sum of \$4,000, in

and about attempting to be cured of the cuts, bruises, wounds and injuries aforesaid, occasioned as aforesaid, and suffered and underwent great pain, and was hindered and prevented and still is hindered and prevented from performing and transacting his necessary affairs and business, and from earning his living, losing thereby a large sum of money, to-wit, the sum of \$40,000.

And for that, whereas, the said defendant, before and at the time of committing the grievance hereinafter next mentioned, was a railroad company engaged in the business of carrying and transporting freight and passengers as common carriers from Jersey City in the county of Hudson, to and through Kearny in said county, and from and between divers other places; and being so engaged in the said business, to-wit, on the 16th day of November, in the year 1895, at Jersey City aforesaid, received into a certain passenger coach attached to a train of cars of said defendant moved and operated by it, the said plaintiff, as a passenger therein to be carried and transported therein by said defendant from Jersey City aforesaid to a station called West Arlington in the said township of Kearny, for certain fare and reward, to-wit, the sum of five (\$5) dollars theretofore paid by the plaintiff for commuting or being daily carried or transported on the trains of said railway company back and forth between the said station called West Arlington and Jersey City aforesaid, from the 1st day of November, A. D. 1895, to the 30th day of November, 1895; and by reason thereof, it then and there became and was the duty of the defendant to have conveyed, or caused to be conveyed, the said plaintiff in the said passenger coach from Jersey City aforesaid to said West Arlington station, and to have provided all necessary opportunity, means and facilities to enable him safely to alight at said station of West Arlington; yet the said defendant, not regarding its duty in that behalf, conducted itself so carelessly, negligently and unskillfully in that behalf, that, by and through the carelessness, negligence and default of said defendant and its servants, and for want of due and proper care and attention to their duty in that behalf, the said plaintiff, while with due care and without negligence on his part attempting to alight from the said passenger coach at the station of West Arlington aforesaid, was violently thrown to the ground between the cars of the said train by the sudden starting thereof, without warning, and the wheels of said train passed

over his right foot, and he thereby was greatly cut, bruised and wounded, and divers members of his body were then and there grievously injured, insomuch that his right leg was necessarily amputated, and he then and there became and was very sick, weak and disabled for a long period, to-wit, from thence to the commencement of this suit, and was permanently injured in his body, limbs and health, and was then and there forced to pay out and expend and did necessarily lay out and expend a large sum of money, to-wit, the sum of \$4,000, in and about attempting to be cured of the cuts, bruises, wounds and injuries aforesaid, occasioned, as aforesaid, and suffered and underwent great pain, and was hindered and prevented and still is hindered and prevented from performing and transacting his necessary affairs and business and from earning his living, losing thereby a large sum of money, to-wit, the sum of \$40,000.

Wherefore, the said plaintiff says that he is injured and has sustained damages in the sum of \$40,000, and, therefore, he brings this suit.

§ 400. The same by a passenger against a steamboat company.

— The Company, the defendant, was summoned to answer unto , the plaintiff, in an action of tort; and thereupon the said plaintiff, by , his attorney, complains for that heretofore, to-wit, on the 19th day of January, 1893, the defendant, as a common carrier of passengers, undertook, for hire, there and then paid defendant by plaintiff, to transport plaintiff by one of its steamboats, from the city of Camden, in the State of New Jersey, to the city of Philadelphia, in the State of Pennsylvania; that the defendant negligently and carelessly and without any fault on the part of the plaintiff, ran its said steamboat against one of its docks or slips with great force, and thereby threw the plaintiff with great violence upon and against a post, being then a part of said steamboat, and thereby seriously and permanently injured the plaintiff, and ruptured him, and caused him great pain of body and mind, and caused him to expend and lay out large sums of money in his endeavors to have himself cured of said wounds and injuries, all to his damage \$10,000; wherefore, he brings his suit, etc.

§ 401. The same by husband and wife, for injuries to the wife, while a passenger on an electric car.— The , a corpora-

tion, the defendant in this suit, was summoned to answer unto and , the plaintiffs herein in an action of tort, and thereupon the said plaintiffs, by , their attorney, complain:

For that, whereas, the said defendant, before and at the time of the committing of the grievances hereinafter mentioned was and still is a corporation, duly incorporated and existing under the laws of the State of New Jersey, and at the said time was operating an electric street railway in the county of Bergen aforesaid, between Englewood and the borough of Undercliff in the said county, and at the said time was running and operating street cars by means of electricity under the control and management of motormen and conductors on and along its tracks, for the purpose of carrying in said cars passengers for hire, for the mutual gain and advantage to itself, the said defendant, and the public wishing to travel on said railway and be carried thereon for hire; at the said time did carry the public or portions of the public as passengers for hire and for mutual gain and advantage, as aforesaid.

And, whereas, the said plaintiff, A. B., now the wife of C. D., on the 11th day of May, 1897, at the special instance and request of the said defendant and for the mutual accommodation and profit of said plaintiff and defendant, became and was at Undercliff aforesaid, a passenger upon one of the said cars and thereby paid her fare as such passenger to the conductor of said car for the purpose of being safely carried thereon to her destination on said railway, to-wit, to the city of Englewood, county of Bergen, aforesaid, whereupon the said defendant, for hire, as aforesaid, then and there undertook to carry the said plaintiff, A. B., carefully and safely to her point of destination aforesaid.

Yet the said defendant, not regarding its undertaking in this behalf to safely carry the said plaintiff, A. B., to her destination on said railway, negligently, carelessly and unlawfully, through its servants and agents, managed said motor car so that the said car was thrown from the tracks and the said plaintiff, A. B. was violently thrown among the machinery of said car and thereby was greatly bruised, burned, maimed and lacerated in her head, body and limbs, internally and externally, and this without any fault or negligence on her part, to-wit, at Leonia, in the county of Bergen, aforesaid.

By means of which wrongs and injuries the said plaintiff, A. B., became and was sick, sore, lame, paralyzed and otherwise diseased and disordered, and therefrom suffered great pain and anguish of body and mind, and thereby became and was, and has been from thence hitherto, and therefrom during all her natural life will be greatly injured in her head, body and limbs, nervous and muscular system, and thereby ever since then has been prevented from pursuing her lawful affairs and business, from which she has been heretofore accustomed to earn and receive, ever since sustaining the same, large sums of money; and has also been thereby caused to lay out and expend, and has laid out and expended, and shall, in the future, for the balance of her natural life, lay out and expend large sums of money, in and about endeavoring to alleviate her sufferings.

Wherefore, the said plaintiff, A. B., says that she has been injured and suffered damage, by reason of the negligence of said defendant, in the sum of \$20,000.

And, therefore, they bring their suit, etc.

§ 402. **The same against a street railway company.**—The _____, the defendant in this suit, was summoned to answer unto _____, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by _____, her attorney, complains:

For that, whereas, the said defendant, at all times hereinafter mentioned, has been and still is a corporation duly incorporated and existing under the laws of the State of New Jersey, and was before and at the time of the committing of the grievances hereinafter mentioned in said county, the proprietor, possessor and operator of a certain street railroad, running along and through divers streets and avenues in Jersey City, in said county, including Communipaw avenue and Grand street, in said city, which said avenue and street were at said time two public highways, open and dedicated to public use and travel, and was then and there the proprietor, possessor and operator of a certain motor car, which by a certain motorman and a certain conductor, as its servants and agents, by means of electricity, it then and there propelled, operated and ran along the tracks of its said railway and along and through Communipaw avenue and Grand street, aforesaid, to-wit, on the 28th day of June, 1895, at and near the intersection of said Communipaw avenue and Grand street in said city.

And, whereas, said plaintiff was, on the said day, and date last aforesaid, lawfully in and upon said Communipaw avenue at the place where the same intersects said Grand street and was then and there crossing over said avenue at the street crossing provided for pedestrians, in a careful and prudent manner, whereby it became and was the duty of the said defendant then and there towards the said plaintiff to use proper care and diligence in the operation of its said railway, track and motor car, and to run the said motor car at a reasonably safe rate of speed and to keep a proper and reasonably careful lookout for pedestrians crossing in front of said car, and to have the said motor car under the control of its said motorman, so as not to negligently or willfully injure her, the said plaintiff, then and there, and to give proper warning of the approach of its said car by a gong, which was its usual method of warning, or by other reasonable warning.

Yet, the said defendant, disregarding its duty in this behalf, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said plaintiff on the said date, in Jersey City, in the county aforesaid, and by its servants and agents, by means of electricity, unskilfully, negligently and unlawfully propelled said motor car along said tracks on Communipaw avenue at said point; and then and there unlawfully and negligently failed to keep a proper and reasonably careful lookout or to exercise due care to keep such lookout for said plaintiff, while she was crossing said street, so as to avoid danger and not injure her, the said plaintiff, while crossing said street, as aforesaid; and then and there unlawfully and negligently failed to keep the said motor car under reasonably safe control of its said motorman; and then and there unlawfully and negligently propelled said motor car at an unusually high and dangerous rate of speed, and without giving any warning of its approach by sounding its gong, which was its usual signal of approach, without giving any warning by any other signal of its approach, so that the said motor car was then and there, through the negligence of said defendant and its servants, as aforesaid, run into and propelled with great force and violence against the said plaintiff, and then and there violently flung her to the ground and thereby greatly bruised, dislocated, lacerated and fractured her head, limbs and body internally and externally, and this without any fault or negligence on her part.

By means of which wrongs and injuries said plaintiff became and was sick, sore, lame, paralyzed, maimed and otherwise diseased and disordered and therefrom suffered great pain and anguish of body and mind, and thereby became and was and has been from thence hitherto and now is and evermore during her natural life will be permanently injured in her head, body, mind and otherwise, and thereby ever since then has been hindered and prevented from pursuing her lawful avocations, from which she has theretofore been accustomed to earn and receive, and but for said injuries would have earned and received a large sum of money, to-wit, \$15 for each and every week since then, and but for said injuries during the balance of her life would earn and receive large sums of money, to-wit, \$15 per week, but which, on account of said injuries, she will not be able to earn or receive; wherefore, said plaintiff says that she has been injured and suffered damage by reason of the negligence of said defendant in the sum of \$25,000, and, therefore, she brings her suit.

§ 403. **The same by a servant against a master.**— The defendant in this suit was summoned to answer unto _____, the plaintiff therein, in an action of tort, and there upon the said plaintiff, by _____, his attorneys, complains for that, whereas, to-wit, on the 9th day of October, in the year of our Lord, 1894, in the city of Trenton, in the county aforesaid, the said plaintiff was employed as a servant of the said defendant, in his factory, and it was then and there the duty of the said plaintiff, amongst other things of his said employment and engagement, to work as a common laborer, and not to do or perform any work requiring the skill or special knowledge of a mechanic or machinist; and the said plaintiff says and avers that the said defendant, on the 2d day of December, in the year last aforesaid, and by and through its agents, ordered and directed the said plaintiff, contrary to the engagement and scope of employment of the said plaintiff, to work upon a certain boiler, and then and there to perform work requiring the knowledge and skill of a machinist and mechanic, which the said plaintiff did not possess and of which the said defendant had notice, and the said defendant then and there furnished the said plaintiff with a certain chisel and pair of tongs which were out of repair, unsuitable, unsafe and insufficient for the said plaintiff to do and perform the said work so directed and commanded upon him by the said

defendant, and which said tools, so unsafe, unsuitable and insufficient, made the work enjoined upon the said plaintiff perilous, dangerous and hazardous, whereof the said plaintiff was unaware, unadvised and uninstructed by the said defendant, and which said work the plaintiff could not perform without incurring dangers, risks and perils beyond the scope and duties of his said employment; and the said plaintiff being then and there assured by the said defendant that the said tools were sufficient and safe for the said work, and that there were no dangers or hazards incident to the performing of the work enjoined upon said plaintiff on the said boiler on the said 2d day of December, in the year last aforesaid, so that by reason of the premises, while the said plaintiff was performing the service on the day last aforesaid on the said boiler, the said chisel, by reason of the unsafety, unsuitableness and insufficiency of the said tongs the chisel was likely and liable to slip on the said boiler and cause chips, fragments and pieces of the said boiler to fly and strike and hit the said plaintiff in his face and eyes, all of which matters and things were then and there known to the said defendant and could have been known by the said defendant, by the exercise of proper care, diligence, skill and inspection of the said tools and implements, so that by reason of the premises and on account of the negligence, carelessness, improvidence and misconduct of the said defendant, and by reason of the tongs, chisel and implements so furnished to him to perform the said work being in an unsafe condition and unsuitable and out of repair, and by reason of the failure to instruct the said plaintiff and to advise him of the dangers thereof, the said plaintiff, to-wit, on the 2d day of December, in the year A. D., 1894, while working on the said boiler, was hit in the eye by chips, fragments and pieces of the said boiler, caused by the slipping of the said chisel, and by reason thereof the eye of the said plaintiff was put out, and he was thereby wounded, hurt, bruised and lacerated, and lost the sight of his said eye, and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, for the space of two months next following, during all of which time the said plaintiff thereby suffered and underwent great pain, and was permanently injured, and will suffer and undergo great pain in the future, and the said plaintiff thereby lost one of his eyes, and the said plaintiff was thereby hindered and prevented from performing and transacting his

necessary affairs and business, by him during that time to be performed and transacted, and was thereby forced and obliged to pay, lay out and expend large sums of money, to-wit, the sum or \$500, in and about endeavoring to cure himself of his said wounds, and endeavoring to restore the sight of his said eye, occasioned, as aforesaid, to-wit, at Trenton, aforesaid, on the 2d day of December, A. D., 1894, and other wrongs to the said plaintiff then and there done to the damage of the said plaintiff of \$10,000, and, therefore, he brings suit, etc.

§ 404. The same against an electric street railway company.—

The _____, the defendant in this suit, was summoned to answer unto _____, administrator of all and singular the goods and chattels, rights and credits which were of _____, deceased, in an action of tort; and thereupon the said plaintiff, by _____, his attorney, complains for that, whereas, the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, was the owner and possessor of a certain electric railway, extending from the city of Camden, in the county of Camden, to the city of Woodbury, in the county of Gloucester, in this State, occupied and operated by the defendant for the conveyance and reconveyance of passengers between said terminal and intermediate points.

And, whereas, before and at the time of committing the said grievances, to-wit, on the 29th day of October, 1893, there was and still is a common and public highway, road or street, in the city of Camden, in the county of Camden, aforesaid, called Broadway, for all citizens of this State to travel, pass and repass safely on foot and in carriages and other vehicles at their will at all times.

And, whereas, said _____, in his lifetime, to-wit, on the day and year last aforesaid, was driving carefully and cautiously on and along said public highway, road or street, called Broadway, in the city of Camden and county aforesaid; nevertheless, the said defendant then and there so carelessly, negligently and improperly drove, governed and directed its certain electric motor and cars that by and through the carelessness, recklessness and negligent conduct of the said defendant by its said servants in that behalf, the said _____ was then and there struck by said cars and said electric motor of defendant with great force; and the said _____ was then and there crushed beneath the said

electric motor and cars, and was then and there cast down with great violence to and upon the ground, and by reason thereof lost his life.

And plaintiff further avers, that afterwards, to-wit, on the 20th day of December, A. D., 1893, at the county of Gloucester, aforesaid, administration of all and singular the goods and chattels, rights and credits which were of the said A. B., deceased, at the time of his death, who died intestate was granted in due form of law by _____, surrogate of said county of Gloucester, to said C. D., the said plaintiff, and which said letters he brings here into court; and the said A. B. left him surviving E. F., his widow, H. I., K. L., his daughters, and M. N. and O. P., his sons; and the said plaintiff brings this suit for the benefit of the next of kin of the said A. B., under and according to the provisions of an act entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by a wrongful act, neglect or default," and the several supplements thereto.

And the plaintiff avers that he is damaged by the said wrongful acts, omissions and negligence of said defendant in the sum of \$25,000, and, therefore, he brings his suit, etc.

§ 405. **The same for causing a collision.**—The _____, a corporation, the defendant in this suit, was summoned to answer _____, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by _____, his attorney, complains: For that, whereas, the said defendant, on the 23d day of February, 1895, was the owner and possessor of a certain passenger car, which was operated, propelled and run along by electric power, in and upon certain railway tracks, in the possession and under the control and management of the said defendant, said tracks being situated upon and extending along Broad street, a public street or highway in the city of Newark, in the county of Essex, aforesaid; and it thereby became, and was the duty of the said defendant to use due and proper care in the use, management and control of said passenger car, while being operated, propelled and run along said public street or highway, and upon said tracks, as aforesaid, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and to use due and proper care in operating, propelling and running said car along said public street or highway,

so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and to operate, propel and run said car at such a rate of speed, so as to keep the same within safe and proper control; yet the said defendant, not regarding its duty in that behalf, did not use due and proper care in the use, management and control of said passenger car, while said car was being operated, propelled and run along said public street or highway, upon said tracks, as aforesaid, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and did not use due and proper care in operating, propelling and running said car along said public street or highway, and did not operate, propel and run said car at such a rate of speed, so as to keep the same within safe and proper control, but wholly failed and neglected so to do; and the said defendant did, on the day and year aforesaid, at the city of Newark, in the county of Essex, aforesaid, by its servants, so carelessly, negligently and improperly operate, propel and run said car in, upon and along said public street or highway, and upon said tracks, as aforesaid, and at such a high rate of speed, so as to lose the safe and proper control of the same, and thereby then and there collided with and ran into a certain wagon, which was then and there being lawfully pulled along said public street or highway, by a horse attached to said wagon, in which the said plaintiff was then and there lawfully sitting and riding along said public street or highway, with such force and violence as to throw said plaintiff off of said seat, and upon said street or highway, thereby seriously, painfully and permanently bruising, wounding and injuring the said plaintiff, so that his life was despaired of; and also, by means of the premises, the plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, hitherto, during all which time the said plaintiff suffered and underwent great pain, and in the future will suffer and undergo great pain, and was hindered and prevented, and in the future will be hindered and prevented, from transacting and attending to his necessary and lawful affairs by him, during all that time to be performed and transacted, and lost, and was deprived of, and in the future will lose and be deprived of, divers great gains, profits and advantages which he ought and otherwise would have derived and acquired; and thereby also the said plaintiff was forced and obliged to lay out

and expend divers large sums of money, amounting in the whole to the sum of \$3,000, in and about endeavoring to be cured of the said wounds, bruises and injuries, so received, as aforesaid, at Newark, in the county of Essex, aforesaid.

Wherefore, the said plaintiff says that he is injured and has sustained damages to the amount of \$10,000, and, therefore, he brings his suit, etc.

§ 406. The same by a minor for injuries caused in a collision.

— The _____, a corporation, the defendant in this suit, was summoned to answer _____, the plaintiff therein, in an action of tort, and the plaintiff being an infant under the age of twenty-one years, his father, _____, has been appointed his next friend to prosecute this action in his behalf, and thereupon said _____, by _____, his next friend, complains: For that, whereas, the said defendant, on the 23d day of February, 1895, was the owner and possessor of a certain passenger car, which was operated, propelled and run along by electric power, in and upon certain railway tracks, in the possession and under the control and management of the said defendant; said tracks being situated upon and extending along Broad street, a public street or highway in the city of Newark, in the county of Essex, aforesaid; and it thereby became and was the duty of the said defendant to use due and proper care in the use, management and control of said passenger car, while being operated, propelled and run along said public street or highway, and upon said tracks, as aforesaid, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and to use due and proper care in operating, propelling and running said car along said public street or highway, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and to operate, propel and run said car at such a rate of speed, as to keep the same within safe and proper control; yet, the said defendant, not regarding its duty in that behalf, did not use due and proper care in the use, management and control of said passenger car, while said car was being operated, propelled and run along said public street or highway, upon said tracks, as aforesaid, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway and did not use due and proper care in operating, propelling and running said car along

said public street or highway, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and did not operate, propel and run said car at such a rate of speed so as to keep the same within safe and proper control, but wholly failed and neglected so to do; and the said defendant did, on the day and year aforesaid, at the city of Newark, in the county of Essex aforesaid, by its servants, so carelessly, negligently and improperly operate, propel and run said car in, upon and along said public street or highway, and upon said tracks, as aforesaid, and at such a high rate of speed as to lose the safe and proper control of the same, and thereby then and there collided with and ran into a certain wagon, which was then and there being lawfully pulled along said public street or highway, by a horse attached to said wagon, in which the said plaintiff, , was then and there lawfully riding and driving along said public street or highway, with such force and violence as to throw said plaintiff out of said wagon and upon said street or highway, thereby seriously, painfully and permanently bruising, wounding and injuring the said plaintiff, so that his life was despaired of; and also, by means of the premises, the plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, hitherto, during all which time the said plaintiff suffered and underwent great pain, and in the future will suffer and undergo great pain, and was hindered and prevented, and in the future will be hindered and prevented, from transacting and attending to the necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of, and in the future will lose and be deprived of, divers great gains, profits and advantages which he ought and otherwise would have derived and acquired, to-wit, at Newark, in the county of Essex, aforesaid.

Wherefore, the said plaintiff says that he is injured and has sustained damages to the amount of \$10,000, and, therefore, he brings his suit, etc.

§ 407. The same for causing a collision.— The , a corporation, the defendant in this suit, was summoned to answer , the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by , his attorney, complains: For that, whereas, the said defendant, on the 23d day of February, 1895,

was the owner and possessor of a certain passenger car, which was operated, propelled and run along by electric power, in and upon certain railway tracks, in the possession and under the control and management of said defendant, said tracks being situated upon and extending along Broad street, a public street or highway in the city of Newark, in the county of Essex, aforesaid, and it thereby became and was the duty of the said defendant to use, due and proper care in the use, management and control of said passenger car, while being operated, propelled and run along said public street or highway and upon said tracks, as aforesaid, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and to use due and proper care in operating, propelling and running said car along said public street or highway, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway, and to operate, propel and run said car at such a rate of speed, so as to keep the same within safe and proper control; yet the said defendant, not regarding its duty in that behalf, did not use due and proper care in the use, management and control of said passenger car, while said car was being operated, propelled and run along said public street or highway, upon said tracks, as aforesaid, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway and did not use due and proper care in operating, propelling and running said car along said public street or highway, so as to avoid colliding with and running into persons lawfully driving along or crossing said public street or highway; and did not operate, propel and run said car at such a rate of speed, as to keep the same within safe and proper control, but wholly failed and neglected so to do; and the said defendant did, on the day and year aforesaid, at the city of Newark, in the county of Essex, aforesaid, by its servants, so carelessly, negligently and improperly operate, propel and run said car in, upon and along said public street or highway, and upon said tracks, as aforesaid, and at such a high rate of speed, as to lose the safe and proper control of the same, and thereby then and there collided with and ran into a certain wagon, which was then and there being lawfully pulled along said public street or highway, by a horse attached to said wagon, in which the said plaintiff was then and there lawfully sitting and driving along said public street or highway, with such force

and violence as to throw said plaintiff off of said seat and upon said street or highway, thereby seriously, painfully and permanently bruising, wounding and injuring the said plaintiff, so that his life was dispaired of; and also, by means of the premises, the plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, hitherto, during all which time the said plaintiff suffered and underwent great pain, and in the future will suffer and undergo great pain, and was hindered and prevented and in the future will be hindered and prevented from transacting and attending to his necessary and lawful affairs by him, during all that time to be performed and transacted, and lost and was deprived of, and in the future will lose and be deprived of, divers great gains, profits and advantages which he ought, and otherwise would have derived and acquired; and thereby, also, the said plaintiff was forced and obliged to lay out and expend divers large sums of money, amounting in the whole to the sum of \$3,000, in and about endeavoring to be cured of the said wounds, bruises and injuries, so received, as aforesaid, at Newark, in the county of Essex, aforesaid.

Wherefore, the said plaintiff says that he is injured and has sustained damages to the amount of \$15,000, and, therefore, he brings his suit, etc.

§ 408. The same for injuries received at a public crossing.—The _____, the defendant in this suit, was summoned to answer unto _____, the plaintiff herein, in an action of tort, and thereupon the plaintiff, by _____, his attorney, complains:

I. For that, whereas, heretofore, to-wit, on the 23d day of September, 1896, in the town of Morristown, to-wit, in the county of Morris, aforesaid, the plaintiff was lawfully travelling upon and along a certain public highway, then and there being called Saw-Mill lane, leading from Morris street in a north-easterly direction to and past the northerly end of the passenger station of the defendant and to and past the northerly end of the freighthouse of the defendant, and leading thence to a certain mill known as Caskey's mill, in Morristown, aforesaid, across which highway and at the same level therewith there was then and there situate a certain railroad called the Morris and Essex railroad, which railroad was then and there in the possession and occupation of the defendant, and the defendant was

then and there in the possession of a certain train of cars, composed of a certain locomotive engine and one railroad car, to-wit, a caboose, which engine and car were made and fitted to be placed upon and run on and along the said railroad and to be driven by fire and steam in the said locomotive engine, and which locomotive engine and car were then and there being driven upon and along said railroad by the agents and servants of the defendant, under and by virtue of the orders and directions of the defendant, and in and about the business of the defendant, yet the said defendant and its agents and servants, while so driving and operating said engine and car upon and along said railroad, then and there conducted themselves so carelessly and negligently in the premises that they caused the said engine and car to move at a great speed, to-wit, at the speed of thirty miles per hour, and caused the same to pass upon and along said railroad at the speed aforesaid, and then and there to cross the said public highway without giving any warning of the approach of said engine and car to said highway, either by ringing any bell or by blowing any steam whistle, or in any other manner whatsoever, and then and there so negligently and carelessly drove the said engine and car upon and along said railroad across the said public highway at the great speed aforesaid and without any warning, as aforesaid, that they thereby and then and there caused said engine and car to strike against and beat down the plaintiff then and there being in the said public highway, as aforesaid, whereby the plaintiff was greatly injured, crushed, maimed, hurt, cut and wounded so that the plaintiff then and there became and was very sick, weak, lame and disordered and so continued and remained for a long time, to-wit, from thence hitherto at the town of Morristown, to-wit, in the county of Morris, aforesaid, and by reason thereof the plaintiff was forced to lay out and expend and did necessarily lay out and expend divers sums of money, amounting in the aggregate to a large sum of money, to-wit, \$1,000, for his board, care and nursing, and for the attendance of his physicians and for drugs and medicines for his use in and about his sickness aforesaid.

II. And, also, for that, whereas, heretofore, to-wit, on the 23d day of September, 1896, in the town of Morristown, to-wit, in the county of Morris, aforesaid, the plaintiff was lawfully and upon the invitation of the defendant entering upon certain

premises of the defendant, to-wit, a certain freight yard of the defendant there situate, and in so entering did pass upon and along a certain WAGON ROAD for that PURPOSE PROVIDED by the defendant, to-wit, the wagon road entering said freight yard at the northerly end of the passenger station of the defendant in Morristown aforesaid, for the purpose of transacting certain business with the defendant, upon and across which wagon road at the place of entry aforesaid, and crossing said wagon road at the same level therewith, there was then and there situate a certain railroad called the Morris and Essex Railroad, which railroad was then and there in the possession and occupation of the defendant, and the defendant was then and there in the possession of a certain train of cars, composed of a certain locomotive engine and one railroad car, to-wit, a caboose, which engine and car were made and fitted to be placed upon and run on and along the said railroad and to be driven by fire and steam in the said locomotive engine, and which locomotive engine and car were then and there being driven upon and along said railroad by the agents and servants of the defendant under and by virtue of the orders and directions of the defendant and in and about the business of the defendant, yet the said defendant and its agents and servants, while so driving and operating said engine and car upon and along said railroad, then and there conducted themselves so carelessly and negligently in the premises that they caused the said engine and car to move at a great speed, to-wit, at the speed of thirty miles per hour, and caused the same to pass along and upon said railroad at the speed aforesaid, and then and there to cross the said wagon road at the place of entry aforesaid, without giving any warning of the approach of said engine and car to said wagon road, either by ringing any bell or by blowing any steam whistle, or in any other manner whatsoever, and then and there so negligently and carelessly drove the said engine and car upon and along said railroad and across the said wagon road at the great speed aforesaid, and without any warning, as aforesaid, that they thereby then and there caused said engine and car to strike against and beat down the plaintiff, then and there being in the said wagon road at the place of entry aforesaid, whereby the plaintiff was greatly injured, crushed, maimed, hurt, cut and wounded so that the plaintiff then and there became and was very sick, weak, lame and disordered and so continued and remained for a long time,

to-wit, from thence hitherto at the town of Morristown, to-wit, in the county of Morris, aforesaid, and by reason thereof the plaintiff was forced to lay out and expend and did necessarily lay out and expend divers sums of money, amounting in the aggregate to a large sum of money, to-wit, \$1,000 for his board, care and nursing, and for the attendance of his physicians and for drugs and medicines for his use in and about his sickness, aforesaid.

And so the plaintiff saith that he is injured and hath sustained damage to the amount of \$20,000, and thereupon, he brings his suit, etc.

§ 409. The same for tearing up a public street.— The , the defendant in this suit, was summoned to answer unto A. B., the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by C. D., his attorney, complains, for that, whereas, the said defendant, to-wit, on the 21st day of February, 1884, at Jersey City, in said county, was operating a railroad propelled and worked by horse power, extending from Exchange place, in said city of Jersey City and county of Hudson, in and through the said city and county aforesaid, to Greenville, in the city of Jersey City, and county, as aforesaid, and was engaged in the business of common carriers of passengers thereon, which railroad so running in a southerly and westerly direction, ran along, in, through and upon several public streets and highways, running in a southerly and westerly direction in the said city of Jersey City and county of Hudson aforesaid, among which was the public street or highway known as Ocean avenue, the said railroad was then and there laid, run and operated.

And plaintiff avers that the said public street or highway known as Ocean avenue, as aforesaid, at the time of committing the grievance hereinafter mentioned, and from thence hitherto, was then and there, had been for a long time, was and still is a common public street or highway for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, at their free will and pleasure, by reason whereof the said defendant ought to have conducted itself in and about the running, operating and conducting of the said railroad in a careful, prudent and safe manner in, on, upon and through the said public street or highway, well knowing the premises; yet the said defendant, disregarding its duty in that

behalf, in that by its officers, directors and managers employed and set to work on and upon said railroad in, on and upon said public street or highway aforesaid, a certain then unfit, negligent and improper servant or servants under the control, at the direction and with the knowledge of the said defendant, for hire and reward then and there paid by said defendant to said servant or servants.

And plaintiff further avers that the said servant or servants, in their common and lawful employment, with the knowledge, at the direction and under the control of the said defendant, did then and there, at the time aforesaid, wrongfully, negligently, carelessly, improperly and unjustly put and place divers large quantities of stone, dirt and rubbish in, on and upon said street or highway aforesaid; did then and there negligently, carelessly, wrongfully, improperly and unjustly tear up, excavate and dig holes in, on and upon the said street or highway, by reason whereof the said street or highway was then and there extremely dangerous and hazardous for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, and subjected said persons so travelling to unnecessary dangers and risks, and to such dangers and risks as could and ought to have been provided against by said defendant, and did then and there negligently, carelessly, wrongfully, improperly and unjustly keep and continue the same therein, without fixing, placing or causing to be fixed or placed any warning, notice or signal at or near the said stones or rubbish, at or near the said holes or excavation, to denote or warn or show persons travelling, going, returning, passing or repassing on foot or in, by and with coaches, carriages, wagons and other vehicles, that the same was so then and there extremely dangerous and hazardous.

And the plaintiff further avers that, by means of the premises and in consequence of which said negligence, carelessness, imprudence and wrong conduct of the said defendant in that respect as aforesaid then and there done by said defendant, he, the said plaintiff, while then and there travelling, going, returning, passing and repassing in, on and upon said public street or highway, by and with his horse and wagon, carriage and vehicle, as, by law, he had a right to do, and without any negligence, carelessness or fault on his part, he, the said plaintiff, did then and there fall upon and against said stones, dirt and

rubbish; he did then and there fall into and upon said holes and excavations; he did then and there, with his horse and wagon, carriage and vehicle, drive upon and against the said dirt and rubbish; he, the said plaintiff, did then and there, with his horse, wagon, carriage and vehicle, drive into and upon the said holes and excavations, whereby the said plaintiff, with his horse, wagon, carriage and vehicle, was then and there overturned, by reason whereof he, the said plaintiff, was then and there bruised, hurt, cut, wounded, maimed, sick and sore.

And plaintiff further avers that, by reason of the premises, he was forced to pay, lay out and expend, and of necessity had to pay, lay out and expend divers large sums of money, to-wit, the sum of \$1,000, for drugs, medicines, etc., and, by reason of the premises, he has sustained and suffered permanent loss, injury and damages, to-wit, the sum of \$10,000, in consequence of which a right of action hath accrued to said plaintiff, and, therefore, he brings his suit, etc.

§ 410. The same against a ferry company.—The E. F. Company, the defendants in this suit, were summoned to answer unto A. B., the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by C. D., his attorney, complains:

For that, whereas, before and at the time of committing the grievances hereinafter mentioned, the said defendants, a corporation existing and incorporated under the laws of the State of New Jersey, were possessed of, operating and managing certain steam ferry-boats, for the transportation of passengers, horses, carriages, etc., from a point in the city and State of New York, at or near the foot of Christopher street, in said city, across the Hudson river, to a point in the city of Hoboken, in the county of Hudson aforesaid, at or near the foot of Newark street, in said last-named city, for certain fare and reward in that behalf charged and received, and were then and there possessed of, operating and managing, at or near the foot of Christopher street aforesaid, a certain ferry-house, with entrance gates, driveways, bridge chains, bridges, slips and other appliances for embarking and disembarking passengers, horses, carriages, etc., upon and from said steam ferry-boats, and the said defendants being such possessors, operators and managers of the said steam ferry-boats and of the said ferry-house, with its entrance gates, driveways, bridge chains, bridges, slips and other

appliances aforesaid, heretofore, to-wit, on the day of October, A. D. 1884, the said plaintiff, driving a chestnut-colored mare of great value, to-wit, of the value of \$1,500, harnessed to a top buggy-wagon of great value, to-wit, of the value of \$400, both belonging to the said plaintiff, at the special instance and request of the said defendants, and after the said plaintiff had paid at the entrance gates aforesaid the usual fare and reward to the said defendants in that behalf, was, by the said defendants, received into the said ferry-house as a passenger, to be, with the said mare and wagon, safely transported by one of the steam ferry-boats aforesaid, from the said ferry-house to the city of Hoboken aforesaid, at a point at or near the foot of Newark street aforesaid; and it then and there became the duty of the said defendants to use due and proper care in the operation and management of the said ferry-house and its entrance gates, driveways, bridge chains, bridges, slips and other appliances aforesaid, for the proper safety of the said plaintiff and his said mare and wagon, while necessarily waiting in the said ferry-house to be transported as aforesaid.

Yet the said defendants, not regarding their duty in that behalf, did not use due and proper care in the operation and management of the said ferry-house, entrance gates, driveways, bridge chains, bridges, slips and other appliances aforesaid, for the proper safety of the said plaintiff and of his said mare and wagon, while the same were necessarily waiting in the said ferry-house to be transported as aforesaid, but, on the contrary, the said defendants, by their servants and agents, so carelessly and negligently operated and managed the same, that while the said plaintiff, with the said mare and wagon under his care and that of the said defendants, were necessarily waiting in the said ferry-house, upon the usual driveway provided by the said defendants for such purpose, for the arrival of a boat of the steam ferry-boats aforesaid, upon which to be transported as aforesaid, the said mare, by reason of such careless and negligent operation and management, was caused and enabled to and did break away from the care and control of the said plaintiff, and also, by reason thereof, was caused and enabled to and did run upon one of the bridges aforesaid, and from thence into the Hudson river, dragging with her the said wagon, and having upon her the harness with which she was harnessed to said wagon, and

thereby the said mare was drowned and the said wagon was greatly injured and damaged, the said harness destroyed and a lap robe and blanket then and there in said wagon were lost out and never regained, to-wit, at the city of Hoboken, in the county of Hudson aforesaid.

Wherefore, the said plaintiff says he is injured and has sustained damage to the amount of \$3,000, and, therefore, he brings his suit, etc.

§ 411. The same by husband and wife, for injuries to the wife, from a fall on the stairs of an apartment-house.—H. I., the defendant in this suit, was summoned to answer unto C. D. and A. B., the plaintiffs therein, in an action of tort, and thereupon the said plaintiffs, by E. F., their attorney, complain, for that, whereas, the said defendant, on the day of May, 1885, was, before and at the time of committing the grievances and injuries hereinafter mentioned, the owner, proprietor and lessor of a certain building and house known and designated as an apartment or tenement-house, situated at Grove street, in the city of Jersey City and county of Hudson aforesaid.

And plaintiffs aver that the said building and house known and designated as an apartment or tenement-house aforesaid, was then and there divided into floors, and said floors were, by partitions, subdivided into rooms or suites of rooms, with common passage-ways and staircases then and there leading into and through the said apartment or tenement-house and into and through each floor so divided as aforesaid, and said floors then and there so divided as aforesaid, with the said passage-ways leading into and through each floor, were then and there connected one with the other and with each other by means of common staircases extending from the bottom of said apartment or tenement-house to the top thereof, into and through each floor and into and through each passage-way of the said floors so divided as aforesaid.

And plaintiffs aver that, at the said time above mentioned, they were then and there tenants and lessees of the said defendant, and did then and there rent, lease and hire, for a consideration then and there paid to said defendant, a room or suite of rooms in said apartment or tenement-house so divided as aforesaid, with the privilege of then and there using, in common with the other tenants and lessees of the said apartment or tene-

ment-house, the said passage-ways and staircases, for the purpose of ingress, egress and regress from the said room or suite of rooms so rented, hired and leased as aforesaid.

And plaintiffs aver that the said passage-ways and staircases were then and there so used in common by all the tenants and lessees of the said apartment or tenement-house, for the purpose of ingress, egress and regress from their said rooms or suite of rooms to the said public highway and street below, over which the said defendant then and there retained exclusive control, except the privilege and license so granted as aforesaid to each tenant to use the same then and there for the purposes of ingress, egress and regress as aforesaid.

And plaintiffs aver that the said defendant, being then and there the owner and lessor of the said apartment or tenement-house as aforesaid, and then and there controlling and using the said passage-ways and staircases for the uses and purposes so aforesaid, was bound in law then and there so to construct, use, maintain, equip, light and furnish the said passage-ways and staircases so that the said passage-ways and staircases could then and there be used by the said tenants and lessees and each of them for the purposes of ingress, egress and regress so as aforesaid without danger of bodily harm or injury.

Yet plaintiffs aver that the said defendant, disregarding his duty imposed by law in this behalf, in that the said passage-ways and staircases were then and there so negligently, carelessly, insecurely and improperly constructed, maintained, equipped, lighted and furnished, by the direction and with the knowledge and consent of the said defendant, for the purposes of ingress, egress and regress as aforesaid, and the said defendant did then and there so negligently, carelessly and improperly allow and suffer the said passage-ways and staircases, knowing the same to be so, to become, by inadequate and insufficient lighting, by imperfect and improper oilcloth carpeting and furnishing, and by unnecessary obstructions, pitfalls and holes in the said passage-ways and staircases, dangerous for the purposes then and there of ingress, egress and regress so aforesaid by the said tenants and lessees; that, by reason of the premises and of the improper construction and adaptation of such passage-ways and staircases, and of the improper, careless and negligent manner in which the said passage-ways and staircases were then and there lighted, furnished and equipped, the said

plaintiff, A. B., while then and there using the said passageways and staircases for the purposes of ingress, egress and regress aforesaid from her said room or suite of rooms in the said apartment or tenement-house to the street, as by law she had a right to do, and without any fault or negligence on her part, was then and there thrown and hurled, with great force and violence, to the bottom of the said staircase, on the floor, by reason whereof she, the said plaintiff, A. B., was then and there bruised, hurt, cut, wounded, maimed, sick and sore, and, by reason of the premises she has sustained and suffered great loss, injury and damage, to-wit, the sum of \$5,000, in consequence of which a right of action hath accrued to her, A. B., the plaintiff, and, therefore, she brings her suit, etc.

And the said plaintiff, C. D., complains, for that, whereas, at the time of committing the grievances and injuries hereinabove mentioned, now is and was before the husband of the said plaintiff, A. B.; and the said plaintiff, C. D., avers that, by reason of the premises above set forth, and of the bruises, hurts, cuts, wounds, injuries and sickness of his said wife, A. B., aforesaid, then and there done and inflicted on her by the carelessness, negligence and wrong conduct of the said defendant, he, the said plaintiff, C. D., husband of the said A. B., has suffered great loss, damage and injury by then and there being deprived of the society, companionship and consortium of his said wife for a long space of time, to-wit, six months, and said plaintiff, C. D., avers, as such husband, by reason of the negligence, wrong conduct and carelessness of the said defendant as aforesaid, he had, of necessity and by law, to spend and lay out a large sum of money in effecting her cure, to-wit, the sum of \$1,000; by reason of the premises, he, the said plaintiff, C. D., has suffered great loss, damage and injury, to-wit, the sum of \$500, in consequence of which a right of action hath accrued to said plaintiff, C. D., and, therefore, he brings his suit, etc.

§ 412. **The same for negligently placing obstructions on a street.**—A. B. and C. D., partners, trading under the firm name and style of A. B. & C. D., were summoned to answer unto E. F., who was admitted by the court here to prosecute an action for H. I., an infant, the plaintiff therein, in an action of tort; and thereupon the said plaintiff, by J. K., his attorney, complains, for that, whereas, the said defendants, to-wit, on the

day of January, 1885, at Jersey City, in said county, were, before and at the time of committing the grievances and injuries hereinafter mentioned and set forth, proprietors and operators of a certain building and premises situate in Hudson street, at the corner of Morris street, in said city of Jersey City, and county aforesaid, used and operated as a cooperage establishment.

And plaintiff avers that the said public street or highway known as Hudson street as aforesaid, with the sidewalks thereof, at the time of committing the grievances hereinafter mentioned and set forth, and thence hitherto, was then and there, had been for a long time and still is a common public street or highway for all persons to go and return in and upon, travel, walk, pass and repass on foot in and upon, and in, by and with coaches, wagons, carriages and other vehicles, at their free will and pleasure, unmolested and in nowise obstructed, by reason whereof the said defendants ought to have conducted themselves in and about the operating, conducting and carrying on of their said cooperage establishment and business, and in and about the handling, moving and removing, stacking and piling up of the materials and products for and of and the machinery and appliances incident to the said cooperage business and establishment, in a careful, prudent and safe manner in and around their said building and premises, and in front of, beside, near, adjoining and opposite to their said building and premises, and in and upon the said public street or highway, and the sidewalks thereof adjacent to the said building and premises as aforesaid; yet the said defendants, well knowing the premises, disregarded their duty in that behalf, in that they themselves, or by their managers, foremen, overseers and employes employed and set at work and caused to be employed and set at work in and about said cooperage business and establishment and in and around their said building and premises and in and upon the said public street or highway and the sidewalks thereof in front of, beside, near, adjoining and opposite to their said building and premises, certain then unfit, careless, negligent and improper servant or servants, for hire and reward then and there paid by the said defendants to the said servant or servants.

And plaintiff further avers that the said servant or servants, in the course of his or their common and lawful employment, with the knowledge, at the direction and under the control of

the said defendants, did then and there, at the time and place aforesaid, wrongfully, negligently, carelessly, improperly and unjustly handle, move and remove, place, stack and pile up, in divers rows and tiers, and was or were then and there wrongfully, negligently, carelessly, improperly and unjustly handling, moving and removing, placing, stacking and piling up, in divers rows and tiers, certain casks, barrels, tierces and hogsheads, in large quantities and numbers, products and incidents of the said cooperage business and establishment, in and upon the said public street or highway and the sidewalks thereof, by reason whereof the said public street or highway, with the sidewalks thereof, was then and there extremely dangerous and hazardous for all persons to go and return, travel, walk, pass and repass in and upon, and subjected persons so travelling, walking, going and returning, passing and repassing in and upon the said public street or highway and the sidewalks thereof, to great and unnecessary dangers and risks, and to such dangers and risks as could and ought to have been avoided and provided against by the said defendants; and the said defendants did then and there permit, allow and cause to continue the said dangers, hazards and risks so as aforesaid, without any signal, notice or caution to warn or show persons so travelling, walking, going and returning, passing and repassing in and upon the said public street or highway and the sidewalks thereof, that the same were so then and there extremely dangerous and hazardous.

And plaintiff further avers that, by means of the premises and in consequence of said negligence, carelessness and imprudence and wrongdoing and misconduct of the said defendants and their said servant or servants in that respect as aforesaid, then and there, on the part of the said defendants and their said servant or servants, the said infant, while then and there travelling, walking, going, returning, passing and repassing in and upon the said public street or highway and the sidewalks thereof adjacent to the said premises of the said defendants, on foot, without any negligence, carelessness or fault on his part, was then and there struck, knocked down and felled by a certain cask, barrel, tierce and hogshead, and by certain casks, barrels, tierces and hogsheads, hurled, rolled, thrown, let fall and let drop by the said defendants and their said servant or servants, whereby and by reason of the blow and the force thereof, one of the legs of the said infant was then and there

fractured, crushed and broken, and he, the said infant, was then and there bruised, hurt, cut, wounded, maimed, sick and sore, and that without any negligence, carelessness or fault on his part.

And plaintiff further avers that, by reason of the premises, the said infant was forced to pay, lay out and expend, and of necessity had to pay, lay out and expend divers large sums of money, to-wit, the sum of \$1,000, for drugs, medicines and medical attendance, and, by reason of the premises, he, the said infant, has sustained and suffered great loss, injury and damages, to-wit, the sum of \$10,000, in consequence of which a right of action hath accrued to the said plaintiff for the use and benefit of the said infant, and thereupon, he brings his suit, etc.

§ 413. **The same by a passenger for negligence against the owners of a steamboat.**— For that, whereas, the said defendants, before and at the time of committing the grievances next hereinafter mentioned, were owners and proprietors of a certain steamboat, moved and propelled by steam, called the “Advocate,” by them used and employed in carrying and conveying passengers and goods, wares and merchandises, on the waters of the Hudson river, from Albany to Stuyvesant, in the county of Columbia, and to divers other places on and adjacent to the said river, and being such owners and proprietors of the said steamboat, the said defendants, on the day of , in the year of our Lord one thousand eight hundred and , at Albany, to-wit, at the city and in the county of Albany, received into the said steamboat, Maria, the wife, and Mary, Janett, Lydia, Emeline and Edward, the children and servants of the said plaintiff, as passengers therein, from Albany aforesaid to Stuyvesant aforesaid, for certain fare and reward, and by reason thereof, the said defendants ought carefully to have conveyed the said wife and children of the said plaintiff in the said last-mentioned steamboat, from Albany aforesaid to Stuyvesant aforesaid; yet the said defendants, not regarding their duty in this behalf, conducted themselves so carelessly, negligently and unskillfully in this behalf, that by and through the carelessness, negligence, unskillfulness and default of themselves and their servants, in generating the steam for propelling the said steamboat, and in managing, regulating and securing the same, and for want of due care and attention to their duty in

that behalf afterwards, and whilst the said last-mentioned steam-boat was carrying and conveying the wife and children aforesaid, of the said plaintiff as aforesaid, and before the arrival thereof at Stuyvesant aforesaid, to-wit, on the day and year last aforesaid, at Coeymans, to-wit, at the city and in the county of Albany, divers large quantities of steam escaped from the boiler and apparatus wherein the same was generated, connected with the said boat, and drove into and fell upon the said wife and children of the said plaintiff, by means whereof the said wife and children of the said plaintiff were, respectively, greatly hurt and injured, burned and scalded, and thereby then and there became and were very sick, sore, weak and distempered. And the said wife of the said plaintiff, and the said Mary and Emeline, have each remained and continued so sick, weak and distempered for a long space of time, to-wit, from thenceforth hitherto at Coeymans, to-wit, at the city and in the county of Albany aforesaid, during all which last-mentioned time the said plaintiff hath lost and been deprived of the aid and assistance of his said wife, and of the said Mary and Emeline, in the management of his domestic affairs and business, and hath been forced and obliged to lay out and expend, and did actually lay out and expend divers sums of money, in the whole amounting to a large sum of money, to-wit, the sum of , in and about the attempting the cure of his said wife and his said several children, and the procuring necessary medicines, attendances, means of cure and assistance for them during their said several sicknesses, weaknesses and disorders, which ensued as aforesaid from the burning and scalding, hurts and injuries occasioned by the escape and driving of the said steam into and upon them and each of them as aforesaid; and the said plaintiff was thereby prevented from pursuing and prosecuting his necessary affairs and business for a long space of time thereafter, to-wit, for the space of six weeks thence next ensuing, and was otherwise greatly damnified and injured, to-wit, at the city and county of Albany aforesaid.

§ 414. **The same averring special injury and damage to the plaintiff.**— For that, whereas, the said defendants, before and at the time of the committing of the grievances hereinafter next mentioned, were lessees, owners and proprietors of two certain ferries, the one thereof established from the foot of Fulton

street, in the city of New York, in the county of New York, across the East river, to the foot of Fulton street, in the city of Brooklyn, in the county of Kings, and called and known by the name of the Fulton Ferry, and the other thereof established from the foot of Whitehall street, in said city and county of New York, across the said river to the foot of Atlantic street, in the said city of Brooklyn, in said county of Kings, and called and known by the name of the South Ferry, together with all and singular the ferriage and rights of ferriage, fees and perquisites, benefits, profits and advantages whatsoever, and also the bulkheads, wharves, piers, slips, floats, bridges, fixtures and appurtenances unto said ferry belonging, and also the lessees, owners and proprietors of certain steam ferry-boats, moved and propelled by steam, called and known by the following names, to-wit, the Nassau, Suffolk, Olive Branch, Jamaica and Fulton, by them, the said defendants, used and employed in carrying passengers, carriages, horses and effects in and about the business of said ferries and in the ferrying and transportation of passengers, carriages, horses and effects to and from the foot of each of the streets last aforesaid, and being such lessees, owners and proprietors of the two ferries, the bulkheads, wharves, slips, piers, floats, bridges and other fixtures, and the steam ferry-boats last aforesaid, the said defendants, heretofore, to-wit, on the 10th day of November, 1843, at Brooklyn, to-wit, at the city and county of New York aforesaid, received into one of said steam ferry-boats, to-wit, the ferry-boat called "Nassau," and running to and from the foot of Fulton street, in the city of New York aforesaid, to and from the foot of Fulton street, in the city of Brooklyn aforesaid, the plaintiff, as passenger therein, for certain fare and reward to the said defendants in that behalf, to be by them, the said defendants, ferried, transported and conveyed from the said city of Brooklyn to the said city of New York, and, by reason thereof, the said defendants ought carefully to have ferried, transported and conveyed the said plaintiff, in the said last-mentioned ferry-boat, to the city of New York aforesaid; yet the said defendants heretofore, to-wit, on the day and year last aforesaid, to-wit, at the city and county of New York aforesaid, well knowing the premises and not minding and regarding their duty in this behalf, by themselves and their agents and servants, took so little and bad care in the management of said last-mentioned ferry-boat, in man-

aging and conducting the same to the wharf or dock, in the city of New York aforesaid, and in not keeping up a bar, chain or rope across the front of said boat until the same was securely moored and fastened to the wharf or dock last aforesaid, and until all danger from landing from said ferry-boat to said wharf or dock was over; that, by and through the carelessness, negligence and mismanagement of the said defendants in this behalf, and their agents and servants employed by the said defendants and in their behalf, and for want of due and proper care of the said defendants, their agents and servants, the left leg of said plaintiff, with great force and violence, was caught between the said last-mentioned ferry-boat and the wharf or dock last aforesaid, as he, the said plaintiff, was attempting to land from said ferry-boat to said wharf or dock, utterly ignorant of any danger, whereby the said plaintiff was then and there greatly injured, bruised, hurt and wounded, and thereby then and there lost his said left leg, and became and was sick, sore, lame and disordered, and so remained and continued for a great space of time, to-wit, for the space of six months, and during all that time was and still is wholly hindered and disabled from following his profession and business, and hath been put to great expense and hath laid out a large sum of money, to-wit, the sum of \$2,000, in and about the amputation of said left leg and in endeavoring to be cured of the said wounds, sickness, soreness, lameness and disorder, so as last aforesaid occasioned, and hath been and is permanently crippled and disabled by said loss of his left leg, and hath been and is otherwise greatly injured and damnified, to-wit, at the city of New York, in the city and county of New York aforesaid.

And for that, whereas, also, the said defendants, before and at the time of the committing other the grievances next hereinafter mentioned, were lessees, owners and proprietors of other two certain ferries, the one thereof established from the foot of Fulton street, in the city of New York and county of New York, across the East river, to the foot of Fulton street, in the city of Brooklyn, in the county of Kings, and known by the name of the Fulton Ferry, and the other thereof established from the foot of Whitehall street, in said city and county of New York, across the said river, to the foot of Atlantic street, in the said city of Brooklyn and county of Kings aforesaid, and known by the name of the South Ferry, together with all and

singular the ferriage and rights of ferriage, fees and perquisites, benefits, profits and advantages whatsoever, and also other the bulkheads, wharves, piers, slips, floats, bridges, fixtures and appurtenances unto the said ferries belonging, and also the lessees, owners and proprietors of certain other steam ferry-boats, moved and propelled by steam, called and known by the names of Nassau, Suffolk, Olive Branch, Jamaica and Fulton, by them, the said defendants, used and employed in carrying passengers, carriages and horses and effects in and about the business of the said ferries, and in the ferrying and transportation of passengers, carriages, horses and effects to and from the foot of each of the streets last aforesaid; and being such lessees, owners and proprietors of other the two ferries, the bulkheads, wharves, piers, slips, floats, bridges and other fixtures, and the steam ferry-boats last aforesaid, the said defendants heretofore, to-wit, on the 10th day of November, 1843, at Brooklyn, to-wit, at the city and county of New York aforesaid, received into one of said steam ferry-boats, to-wit, the steam ferry-boat called "Nassau," and running to and from the foot of Fulton street in the city of New York aforesaid, to and from the foot of Fulton street in the city of Brooklyn aforesaid, the said plaintiff, as passenger therein, to be by them, the said defendants, ferried, transported and conveyed from the said city of Brooklyn to the said city of New York, for certain fare and reward to the said defendants in that behalf, and by reason thereof the said defendants ought carefully to have ferried, transported and conveyed the said plaintiff in the said last-mentioned ferry-boat to the city of New York aforesaid; yet the said defendants heretofore, to-wit, on the day and year last aforesaid, to-wit, at the city and county of New York aforesaid, well knowing the premises, and not minding and regarding their duty in this behalf, by themselves and their agents and servants, took so little and bad care in the management of said last-mentioned ferry-boat in conducting and bringing the same to the wharf or dock in the city of New York aforesaid, and in not providing, maintaining, keeping up and suspending in and upon said last-mentioned ferry-boat and the bulkheads, wharves, piers, slips, floats and bridges in the city of New York aforesaid, in the night season, sufficient and proper light to enable the said plaintiff and other passengers therein to land from said ferry-boat with safety, and in not duly fastening the last-mentioned boat to the dock before

the passengers were permitted to land therefrom, that by and through the carelessness, negligence, unskillfulness and mismanagement of the said defendants in this behalf, and their agents and servants employed by the said defendants, and in their behalf, and for want of due and proper care of the said defendants, their agents and servants, one of the legs of the said plaintiff with great force and violence was caught between the said last-mentioned ferry-boat and the wharf or dock last aforesaid, whilst he, the said plaintiff, in the night season, was attempting to land from the said ferry-boat to the wharf or dock aforesaid, entirely ignorant of any danger, whereby the said plaintiff was then and there greatly injured, bruised, hurt and wounded, insomuch that his life was greatly despaired of, and thereby afterwards, to-wit, on the day and year and at the place last aforesaid, lost his leg last mentioned, and became and was sick, sore, lame and disordered, and so remained and continued for a great space of time, to-wit, for the space of six months, and during all that time was and still is wholly hindered and disabled from following his profession and business, and hath been put to great expense, and hath laid out a large sum of money, to-wit, the sum of \$2,000, in and about the amputation of said leg, and in endeavoring to be cured of the said wounds, sickness, soreness, lameness and disorder so as last aforesaid occasioned, and has become and is permanently crippled and disabled by the loss and amputation of his said leg, and hath been and is otherwise injured and damaged, to-wit, at the city of New York, in the county aforesaid.

And whereas, also, heretofore, to-wit, on the day and year last aforesaid, at Albany and Troy, to-wit, in the city and county of New York, the said plaintiff was and, for a long space of time then next preceding, had been and still is a surgeon-dentist, and by means of his skill and reputation in his said profession of a surgeon-dentist, the said plaintiff, up to the day and year last mentioned, and the committing of the grievances hereinafter in this count mentioned, had been enabled to earn, and had earned a large sum of money, to-wit, the sum of \$4,000, in each and every year, by the practice of his said profession, and for the due practice of his said profession the use of both the legs of the said plaintiff was convenient, essential and necessary, to-wit, on the day and year and at the place last aforesaid; and whereas, heretofore, to-wit, on the day and year, and at the

place last aforesaid, the said defendants were the proprietors, and by themselves and their agents, in that behalf, were in the actual use and occupation of a certain other ferry-boat, to-wit, the ferry-boat called "Nassau," for the carriage and conveyance of passengers from the foot of Fulton street, in the city of Brooklyn, in the county of Kings, to the foot of Fulton street, in the said city and county of New York, for hire and reward to the said defendants in that behalf; and the said defendants, being such proprietors, and in such use and occupation of the said last-mentioned ferry-boat, as last aforesaid, thereupon heretofore, to-wit, on the day and year and at the place last aforesaid, for a certain fare and reward to the said defendants in that behalf, the said plaintiff became and was a passenger in the said last-mentioned ferry-boat, to be safely and securely carried and conveyed thereby, from the said foot of Fulton street, in the said city of Brooklyn, to the said foot of Fulton street, in the city of New York; and the said defendants then and there received the plaintiff as such passenger as aforesaid, and thereby it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and upon the last-mentioned ferry-boat, from the said foot of Fulton street, in the said city of Brooklyn, to the said foot of Fulton street, in the said city of New York; yet the said defendants, not regarding their duty in that behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and upon the last-mentioned ferry-boat, from the foot of Fulton street, in Brooklyn aforesaid, to the foot of Fulton street, in the city of New York aforesaid, but wholly neglected so to do, and then and there suffered the last-mentioned ferry-boat to be so carelessly, negligently and unskillfully managed and brought up to the dock at the foot of Fulton street, in the city of New York aforesaid, and then and there so negligently and unskillfully threw down and caused to be let and thrown down the guard drawn and placed across the stern or forward end of the last-mentioned boat, for the protection of passengers, prematurely and before it was safe for passengers to leave the last-mentioned boat, and then and there so carelessly and negligently omitted safely and securely to fasten the last-mentioned boat and both sides thereof to the dock at the foot of Fulton street last mentioned, before the passengers then

and there on the last-mentioned boat were permitted to go ashore therefrom, and suffered and permitted the last-mentioned boat, while said passengers therein were stepping ashore therefrom, then and there to be swayed and moved by the motion of the water, and such dangerous chasm or crevice between the same and the dock at which the same boat was then and there landing, to be alternately opened and closed, and then, there in the dusk and darkness of the evening, had and kept such imperfect and insufficient lights in and about the last-mentioned boat that, by reason of the premises above, in this count mentioned, the said plaintiff, through the said negligence, carelessness and mismanagement of the said defendants, while he, the said plaintiff, was attempting then and there to land and go ashore from off the last-mentioned boat, stepped with his left leg between the same and the dock at which the same was then and there landing, and his said leg, by reason of the said premises, was then and there caught between the last-mentioned boat and dock, and wounded, bruised, fractured, broken and crushed, and the plaintiff was otherwise then and there greatly bruised, wounded and injured, insomuch that his life was then and there greatly despaired of; and, also, by means of the premises in this count mentioned, the said plaintiff became and was sick, sore, lame and disordered, and so continued for a long space of time, to-wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain and was hindered and prevented from attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages, which he might and otherwise would have derived and acquired; and, also, by means of the premises in this count mentioned, the said plaintiff afterwards, to-wit, on the day and year and at the place first above mentioned, was obliged to have and did have his said left leg amputated above the knee thereof and lost the same and became and is permanently disabled and crippled thereby, and also became and is permanently disabled and unfitted for carrying on his said profession and business in the introductory part of this count mentioned, and has permanently lost the earnings and gains in the introductory part of this count mentioned, by his said profession, which he might and otherwise would have derived and acquired thereby. And also, by means of the premises in this count mentioned, the said

plaintiff was forced and obliged to, and did then and there pay, lay out and expend divers large sums of money, amounting to a large sum of money, to-wit, the sum of \$2,000, in and about the said amputation of his said leg, and in and about the endeavoring to be cured of the said fractures, bruises and injuries so received, as in this count mentioned; and also thereby the said plaintiff was hindered and prevented from continuing his journey, and was kept and detained at a certain boarding-house, to-wit, at the house of Mrs. Hilton, in Broadway, New York, to-wit, at the city and county of New York aforesaid, a long time, to-wit, for the space of eight weeks, and during that time there incurred great expenses, in the whole amounting to a large sum of money, to-wit, the sum of \$500, in and about his necessary support and maintenance, to-wit, at the place last aforesaid.

For that, whereas, also, the said defendants, before and at the time of committing other the grievances hereinafter next mentioned, were the proprietors and in the actual use of a certain other ferry and of a certain other steam ferry-boat, to-wit, the ferry-boat called the "Nassau," for passage across the East river from and to the foot of Fulton street in the city of Brooklyn, and the foot of Fulton street in the city of New York, and so being such proprietors and in such use of said ferry and steam ferry-boat as in this count mentioned, the said defendants heretofore, to-wit, on the 10th day of November, 1843, received into said last-mentioned ferry-boat the said plaintiff, as passenger from the city of Brooklyn to the city of New York aforesaid, for certain fare and reward to the said defendants in that behalf, and by reason thereof the said defendants ought carefully to have conveyed the said plaintiff in the said last-mentioned ferry-boat to the city of New York aforesaid; yet the said defendants, not regarding their duty in this behalf, conducted themselves so carelessly, negligently and unskillfully that by and through the carelessness, negligence and unskillfulness and default of the said defendants and their agents and servants in managing and conducting said ferry-boat, and in the night season in so carelessly and insufficiently lighting said ferry-boat, that said plaintiff was then and there unable to land with safety from said ferry-boat, by means whereof, and for the want of due and proper care of the said defendants, their agents and servants in this behalf, one of the legs of the said

plaintiff was then and there, with great force and violence, caught and jammed between the said last-mentioned ferry-boat and the wharf or dock, at the city of New York aforesaid, as he, the said plaintiff, was then and there attempting to land from said ferry-boat, utterly ignorant of any danger; whereby the said plaintiff was greatly injured, bruised, hurt and wounded, and thereby then and there lost his said leg, and then and there became and was sick, sore, lame and disordered, and so remained and continued for a great space of time, to-wit, for the space of six months, and during all that time was and still is wholly hindered and disabled from following his profession and business, and hath been put to great expense and hath laid out a large sum of money, to-wit, the further sum of \$2,000, in and about the necessary amputation of his said leg, and in and about endeavoring to be cured of the said wounds, sickness, soreness, lameness and disorder, so as last aforesaid occasioned, and hath been and is otherwise greatly injured and damnified, to-wit, at the city of New York, in the city and county of New York aforesaid, to the damage of the said plaintiff of \$50,000, and, therefore, he brings his suit, etc.

§ 415. **The same against the owner of a coach for negligence of his servant.**— For that, whereas, the said plaintiff heretofore, to-wit, on, etc., at, etc. [*venue*], was lawfully possessed of a certain carriage, to-wit [a chaise], of great value, to-wit, of the value of dollars, and of a certain horse [or divers, to-wit, horses], then and there drawing the same, and in which said carriage the said plaintiff was then riding in and along a certain public and common highway; and the said defendant was also then and there possessed of a certain other carriage and of a certain other horse [or divers, to-wit, horses], drawing the same, and which said carriage and horses of the said defendant were then and there under the care, government and direction of a certain then servant of the said defendant, who was then and there driving the same in and along the said highway, to-wit, at, etc.; nevertheless, the said defendant then and there, by his said servant, so carelessly and improperly drove, governed and directed his said carriage and horses that, by and through the carelessness, negligence and improper conduct of the said defendant, by his said servant, in that behalf [one of the hind wheels of], the said carriage of the said defendant

then and there ran and struck, with great force and violence, upon and against the said carriage of the said plaintiff, and thereby then and there crushed, broke to pieces, damaged and destroyed the same [and one of the wheels, and the splinter bar and of the shafts thereof], and the said carriage of the said plaintiff thereby then and there became and was rendered of no use or value to the said plaintiff, and thereby the said plaintiff was then and there cast out and thrown, with great force and violence, from and off his said carriage to and upon the ground there, and, by means of the several premises aforesaid, the plaintiff was then and there greatly bruised, hurt and wounded, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, hitherto, during all which time the said plaintiff suffered great pain and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be done and transacted; and, also, by means of the premises, was forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended divers sums of money, in the whole amounting to a large sum of money, to-wit, the sum of dollars, in and about the endeavoring to be healed and cured of his said wounds, hurt and bruises, occasioned as aforesaid; and, also, by means of the premises, the said plaintiff hath paid, laid out and expended divers large sums of money, amounting, in the whole, to a large sum of money, to-wit, the sum of dollars, in and about the repairing of the said chaise so damaged as aforesaid, to-wit, at, etc.

And whereas, also, the said plaintiff heretofore, to-wit, on, etc., at, etc. [*venue*], was lawfully possessed of a certain other carriage, to-wit, a chaise of great value, to-wit, of the value of dollars, and of a certain other horse [or “of divers others, to-wit, horses”], then and there harnessed to the same, and in which said carriage the said plaintiff was then riding in and along a certain public and common highway; and the said defendant was also then and there possessed of a certain other carriage and of a certain other horse [or “divers, to-wit, other horses”], drawing the same, and which said last-mentioned carriage and horse [or “horses”], the said defendant was then and there driving in and along the said highway, to-wit, at, etc. [*venue*]; nevertheless, the said defendant then and there so carelessly and improperly drove, governed and directed

his said carriage and horses, that, by and through the carelessness, negligence and improper conduct of the said defendant, the said carriage of the said defendant then and there crushed, broke to pieces, damaged and destroyed the said carriage of the said plaintiff, and the said carriage of the said plaintiff thereby then and there became and was rendered of no use or value to the said plaintiff, and thereby, etc.

§ 416. The same against the owners of a stage coach, for overloading and improperly driving the same.—For that, whereas, the said defendants, before and at the time of committing the grievances hereinafter mentioned, were owners and proprietors of a certain stage coach, for the carriage and conveyance of passengers from, etc., to, etc., for hire and reward to the said defendants in that behalf, to-wit, at, etc. [*venue*], and the said defendants being such owners and proprietors of the said coach as aforesaid, thereupon heretofore, to-wit, on, etc., at, etc. [*venue*], the said plaintiff, at the special instance and request of the said defendants, became and was an [outside] passenger upon [or in] the said coach, to be safely and securely carried and conveyed thereby on a certain journey, to-wit, from, etc., to, etc., for a certain fare and reward to be paid to the said defendants in that behalf, and the said defendants then and there received the said plaintiff as such [outside] passenger as aforesaid, and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely carried and conveyed by [and upon] the said stage coach on the said journey, from, etc., to, etc.; yet the said defendants, not regarding their duty in that behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and upon the said stage coach on the said journey, from, etc., aforesaid, to, etc., aforesaid, but wholly neglected so to do, and suffered and permitted one of the wheels of the said coach to be so insufficiently secured, that the same then and there came off, and also suffered and permitted the said coach to be then and there so greatly overloaded, that by reason thereof, afterwards, and whilst the said coach was proceeding with the said plaintiff thereon, in and along the highway, on the said journey from, etc., and before the arrival thereof at, etc., to-wit, on the day and year aforesaid, at, etc. [*venue*], the said coach then and

there became and was overturned, and by means whereof one of the legs of the said plaintiff became and was fractured and broken, and the said plaintiff was otherwise greatly bruised, wounded and injured; and also by means of the premises the said plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, hitherto, during all which said time the said plaintiff suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages, which he might and otherwise would have derived and acquired; and thereby, also, the said plaintiff was forced and obliged to and did then and there pay, lay out and expend divers large sums of money, amounting, in the whole, to the sum of dollars, in and about the endeavoring to be cured of the said fractures, bruises and injuries so received as aforesaid; and also, thereby, the said plaintiff was hindered and prevented from continuing his said journey, and was kept and detained at a certain inn, to-wit, at , in the county of , a long time, to-wit, for the space of weeks, and during that time there incurred great expenses, in the whole amount to a large sum of money, to-wit, the sum of dollars, in and about his necessary support and maintenance, to-wit, at, etc. [*venue*], aforesaid.

And whereas, also heretofore, to-wit, on the day and year aforesaid, to-wit, at, etc. [*venue*], the said plaintiff, at the special instance and request of the said defendants, became and was a passenger by a certain other coach, to be safely and securely carried and conveyed thereby on a certain journey, to-wit, from, etc., to, etc., for certain reward to the said defendants in that behalf, and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely carried and conveyed by the said last-mentioned coach on the said journey from, etc., to, etc.; yet the said defendants, not regarding their duty in this behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed by the said last-mentioned coach on the said journey from, etc., to, etc., but wholly neglected so to do, and, by reason thereof, afterwards, and whilst the said last-mentioned coach was proceeding, with

the said plaintiff as a passenger thereby, in and along the public highway, on the said journey from, etc., and before the arrival thereof at, etc., to-wit, on the day and year aforesaid, at, etc. [venue], the said last-mentioned coach was overturned, and, by means whereof, one of the legs of the said plaintiff then and there became and was fractured and broken, and the said plaintiff was then and there otherwise greatly bruised, wounded and injured; and, also, by means of the premises, the said plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit, hitherto, during all which time the said plaintiff suffered and underwent great pain and was hindered and prevented from transacting and attending to his necessary and lawful affairs and business by him, during all that time, to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired from the same; and thereby, also, the said plaintiff was forced and obliged to and did then and there pay, lay out and expend divers other large sums of money, amounting, in the whole, to the sum of \$200, in and about the endeavoring to be cured of the said last-mentioned bruises, fractures and injuries so received as last aforesaid; and also, thereby, the said plaintiff was hindered and prevented from continuing the said journey and was kept and detained [at a certain inn], to-wit, at _____, in the county of _____, a long time, to-wit, for the space of eight weeks, and, during that time, there incurred great expense, in the whole amounting to a large sum of money, to-wit, the sum of \$700, in and about his necessary support and maintenance, to-wit, at, etc. [venue].

And whereas, also, the said defendants, before the committing of the grievances hereinafter next mentioned, were the owners and proprietors of a certain other stage coach, by them, the said defendants, used and employed for the carriage and conveyance of passengers, at and for certain hire and reward to them in that behalf, to-wit, at, etc. [venue], and the said defendants being such owners and proprietors of the said last-mentioned coach as aforesaid, the said plaintiff heretofore, to-wit, on the day and year aforesaid, to-wit, at, etc. [venue], at the special instance and request of the said defendants, became and was a passenger by the said last-mentioned coach, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from,

etc., to, etc., for certain hire and reward, to be paid to the said defendants in that behalf, and, although the said plaintiff was then and there received by the said defendants as such passenger by the said last-mentioned coach as aforesaid, to be carried and conveyed thereby as aforesaid, yet the said defendants, not regarding their duty in that behalf, so carelessly, negligently, unskillfully and improperly loaded, drove, managed and conducted the said last-mentioned coach that, afterwards, and whilst the said last-mentioned coach was proceeding with the said plaintiff, as such passenger as aforesaid, on the said journey from, etc., to, etc., to-wit, on the day and year aforesaid, to-wit, at, etc. [*venue*], the said last-mentioned coach was, by and through the carelessness, negligence and improper conduct of the said defendants, overturned and thrown down, with the said plaintiff therein as aforesaid, by means whereof one of the legs of the said plaintiff became and was fractured, bruised and broken, and the said plaintiff was otherwise greatly injured, wounded and cut, insomuch that the said plaintiff then and there became and was sick, sore, lame and disordered for a long space of time, to-wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain and was hindered and prevented from carrying on, transacting and proceeding in his lawful and necessary affairs and business by him during that time to be performed and transacted, and thereby lost and was deprived of divers great gains and profits which had been accustomed to arise and accrue, and which otherwise would have continued to arise and accrue to the said plaintiff from the transacting and carrying on of the same; and, also, by means of the premises last aforesaid, the said plaintiff was forced and obliged to and did then and there pay, lay out and expend divers large sums of money, amounting, in the whole, to the sum of \$1,000, in and about the curing and endeavoring to cure the said last-mentioned fractures, bruises, cuts and wounds, to-wit, etc. [*venue*].

[Add other counts, as the case may suggest.]

§ 417. The same where plaintiff's wife was so much hurt, that after being ill for some time, she died.—For that, whereas before and at the time of committing the grievances by the said defendant, as hereinafter next mentioned, the said defendant was owner of a certain stage coach, by him used and employed in carrying passengers from, etc., to, etc., and divers other places, to-

wit, at, etc. [*venue*], and being such owner of the said stage coach, the said defendant, on, etc., to-wit, at, etc. [*venue*], aforesaid, received [into] his said coach one E. F., the wife of the said plaintiff, as a passenger [therein] to be carried and conveyed thereby on a journey, to-wit, from, etc., to, etc., for certain fare and reward to the said defendant in that behalf, and by reason thereof the said defendant ought carefully to have conveyed, or caused to be conveyed, the said E. F. by the said coach, on the said journey from, etc., to, etc. Yet the said defendant, not regarding his duty in this behalf, conducted himself so carelessly, negligently and unskillfully in this behalf, that by and through the carelessness, negligence, unskillfulness and default of himself and his servants, and for want of due care and attention to his duty in that behalf, the said coach afterwards, and whilst the same was carrying and conveying the said E. F. on the said journey as aforesaid, and before the arrival thereof, at, etc., aforesaid, to-wit, on the day and year aforesaid, at, etc. [*venue*], was upset and thrown down, by means whereof the said E. F., then being therein, was greatly cut, bruised and wounded, and divers bones of the body of the said E. F. were then and there broken, insomuch that the said E. F. thereby then and there became and was very sick, weak and distempered, and remained and continued so weak and distempered, for a long space of time, to-wit, from thence until the day of in the year aforesaid, to-wit, at, etc. [*venue*], during all which time the said plaintiff lost and was deprived of the comfort and society of his said wife, and also her aid and assistance in the management of his domestic affairs, which he otherwise would have had and enjoyed, and was forced and obliged to lay out and expend, and did actually lay out and expend, divers sums of money, in the whole amounting to a large sum of money, to-wit, the sum of \$300, in and about attempting the cure of his said wife, and the procuring necessary assistance and attendance for her during her said sickness, weakness and distemper, which ensued in consequence of her being so overturned and wounded as aforesaid, and which continued until the said day of in the year aforesaid, on which said last-mentioned day the said E. F. of her said wounds died, to-wit, at, etc. [*venue*]. [Another count may be added, stating the grievances with less particularity.]⁴

⁴ For other forms, see 2 Humph. Prec. 752-811, and 2 Chit. Pl. 329-333; 3 id. 375-383, 409, 412.

§ 418. The same in an action by a brakeman of a railway company against the company.—John Batterson, plaintiff herein, by Conley & Lucking, his attorneys, complains of the Chicago and Grand Trunk Railroad Company, a corporation organized and existing under the laws of Michigan, defendant herein, of a plea of trespass on the case, filing his declaration, entering rule to plead, etc., as commencement of suit.

First. For that, whereas the Northwestern and Grand Trunk Railroad Company was, on the 2d day of January, 1880, and prior thereto, a corporation existing and doing business under the laws of Michigan, and was the owner and operator of a line of railway between Flint, Michigan, and Lansing, Michigan, and the said plaintiff was an employe of said last-named company, and was a brakeman on one of its freight trains, and was engaged as such brakeman on one of said trains on said day, and said train reached Hamilton, Michigan, before daylight on the morning of the said day; and it then became and was necessary for the said plaintiff to make a coupling of two freight cars together, and to that end to step inside the rails and between the two cars as they came together; and at that point where it became necessary for plaintiff to step between the rails, there existed a deep hole or rut, and the same had existed for a long time previous thereto, and plaintiff did not see the same; and as the cars came together plaintiff stepped into said hole, and, by reason thereof, lost his balance and was thrown suddenly forward; and plaintiff, to save himself, caught hold of the link, and before he could recover himself and release the same, the cars came together, and his right hand was crushed off, whereby the plaintiff had suffered great pain and great loss of money, and, as he is a laboring man, his ability to gain a livelihood has been greatly diminished thereby; and it was the duty of the said last-named company to the plaintiff to have kept the said track or roadbed in good repair, and not to have allowed the said hole or rut to exist there; but said company negligently and carelessly failed to perform said duty, and this plaintiff did not then, or prior thereto, know of said hole or rut, and had no reason to anticipate the same, and plaintiff was free from negligence in respect to the cause of his said injury, whereby an action accrued to plaintiff on said day against said last-named company, and said right of action continued to exist down to and including the time of the consolidation hereinafter set out; and afterwards, to-wit, on the 6th day

of April, 1880, a consolidation was formed between said last-named company, under the statute in such case made and provided, and one or more other railroad companies, forming a continuous line, by which they became merged in a new corporation, whose corporate name then was and now is the Chicago Grand Trunk Railroad Company, the defendant herein; wherefore, by virtue of the statute in such case made and provided, said right of action attached to the said defendant, and now exists, against the same.

Second. And for that, whereas, also the Northwestern and Grand Trunk Railroad Company was, on the 2d day of January, 1880, and prior thereto, a corporation, and the owner and operator of a line of railroad, as set out in the first count, and the plaintiff was its employe and a brakeman on one of its trains, as therein set out, the plaintiff was injured at Hamilton, Michigan, in the manner set out in the first count, and by reason of the hole or rut in the track mentioned in said first count, and plaintiff alleges that the said hole had existed in said track for a long time previous to said time of said injury, and since the original construction of said roadbed and track, and that said track and roadbed had never been properly made, and it was the duty of said last-named company to have constructed said track properly, and not to have allowed said hole to be and remain there; but it negligently failed to perform said duty, and plaintiff did not know of said hole, had no reason to anticipate the same, and was himself wholly free from negligence in respect to his said injury; whereby an action accrued to the said plaintiff on said day against said last-named company, and now exists against the said defendant by reason of the facts set out in the first count; to the plaintiff's damage \$10,000, and, therefore, he brings his suit, etc.⁵

§ 419. **The same by a servant of the purchaser of an elevator against the manufacturer.**— And for a second count in this behalf, the plaintiff avers that, heretofore, to-wit, on the 2d day of February, 1881, Digby V. Bell, Samuel Post and Charles B. Haynes, doing business under the name of the Detroit Soap Company, employers of said plaintiff, were engaged or about to

⁵ But see opinion of Graves, C. J., in *Batterson v. Chicago &c. Ry. Co.*, 49 Mich. 184, 187 (1882).

engage in the manufacture of bar soap; that, from thence to the time of the injury hereinafter mentioned, said plaintiff continued to be the servant of said employers, whose duty it was, together with other servants so likewise employed, to perform general work and labor in the manufacture of said soap, and handling the same during the different processes of manufacture and preparation of the same for market; that defendant was engaged in the business of manufacturing and putting up machinery, and professed to be skillful in the erection and setting up of hoisting apparatus known as elevators, and competent to construct and set up the same in a workmanlike manner and in such complete order that the same, with reasonable care, could be used and run without danger of injury to human life; that so professing his competency as aforesaid, as a convenient means of delivering said soap from one floor to another of the building used and occupied by the employers of said plaintiff for the manufacturing purposes aforesaid, the said defendant constructed and set up in the building aforesaid, for the employers of the said plaintiff, the said hoisting apparatus or machine called an elevator, for the use of said employers and their servants, and to enable said employers and their servants to remove soap from one floor to another of said premises as might be necessary and convenient in the manufacture of said soap, and the preparation of the same for market; that said defendant having so constructed and provided said elevator as aforesaid, heretofore, to-wit, on the 25th day of June, 1881, professed to the employers and to the servants of said employers, and represented to said employers, to said servants and to this plaintiff that said elevator in the said premises was placed and set up by him for the purposes aforesaid, and was intended by him to be used by said employers and their servants for the purpose of enabling them so as aforesaid to remove said soap from one floor to another of said premises, as might be necessary and convenient for said employers or for their said servants, in the due performance of their duty as workmen in and about said premises; and said defendant professed and particularly represented to each and all of the parties aforesaid that said elevator was so constructed as to run either by steam or hand power, was in complete running order and would safely lift or carry 2,000 pounds. And thereupon the said plaintiff, confiding in the representations aforesaid and by command and at the request of said de-

defendant, not knowing that the said elevator was dangerous and unsafe for such purpose, with due and proper care and skill in that behalf, and in the ordinary performance of his duty in handling said soap, went upon said elevator; that at the time he so went upon said elevator the said elevator was wholly unsafe and dangerous, and was not in complete running order and would not safely lift or carry 2,000 pounds, and that defendant then knew, and from long before then well knew and had full means of knowing the same was dangerous, and likely to break and fall down and injure persons when used in the ordinary manner, for the purposes aforesaid, and with a much less weight than 2,000 pounds; that it was the duty of said defendant not to so have provided said elevator in said state for the said purpose, but to have properly constructed said elevator and to have taken care that the said elevator was not unsafe and dangerous, but was put up in a proper and safe state for the purposes aforesaid, and would safely lift or carry 2,000 pounds, and said duty particularly devolved upon said defendant, in that any unskillful, improper or unworkmanlike construction of the same, or the putting up of the same so that it would not safely lift or carry 2,000 pounds, would be, in the use and running of the same, imminently dangerous to human life, as defendant well knew; that, by reason of the aforesaid insecure, wrongful and improper conduct of said defendant in not taking care that said elevator was safe and sufficiently and properly constructed for the purposes aforesaid, and the dangerous, insecure and unsafe state of said elevator, the same, while being so used as aforesaid by said plaintiff, in the ordinary manner, and with due and reasonable skill and care, and while the said plaintiff was upon it, and with a weight much less than 2,000 pounds, to-wit, 1,400 pounds, and while said elevator was in the vicinity of one of the upper floors of said building, the said elevator broke, fell and dropped to the lower floor, whereby and by reason whereof the said plaintiff had two ribs broken, was injured in his spine and otherwise greatly cut, wounded, bruised, maimed and lamed, so as to be unable to perform any service for his employers or to earn any compensation therefor for a long space of time, to-wit, one month, and was so permanently injured that, though afterwards partially recovering, yet, from thence hitherto, the said plaintiff, by reason of his inability and inefficiency, occa-

sioned by the injury aforesaid, has been obliged to work for a much less sum than he otherwise could have earned, and will hereafter, at all times, be obliged, in consequence of said injury, to work for a much less sum than he otherwise would have been able to earn, and was also obliged to pay out a large sum for medical attendance, and also suffered great pain of body and mind, to-wit, in the county aforesaid.⁶

§ 420. The same in actions of negligence in **Massachusetts** — **Public Statutes, 1882** — **Negligence of railroad corporations** — **Maryland.**— “Beginning to answer A. B., of _____, in action of tort: And the plaintiff says the defendants are a corporation owning a railroad between A. and B.; that plaintiff was a passenger on said railroad, and, by reason of the insufficiency of an axle of the car in which she was riding, the plaintiff was hurt; that defendants did not use due care in reference to said axle, but plaintiff did use due care.”

[“This form may be varied to adapt it to many cases, simply by changing the allegation as to the cause of the accident. It is not intended to restrict a party to the statement of one cause, if there were several concurrent causes; and if the plaintiff is in doubt which of several different causes occasioned the accident, he may, under section 27, so declare.”⁷]

§ 421. The same — **Negligence of a town.**—“And the plaintiff says there is, in the town of _____, a public highway leading from _____ to _____, which said defendants are bound to keep in repair; that the same was negligently suffered by defendants to be out of repair, whereby the plaintiff, travelling thereon and using due care, was hurt, and that due notice of the time, place and cause of injury was given.”⁸

⁶ But see the opinion of Cooley, keep its streets in repair; that one J., in *Necker v. Harvey*, 49 Mich. of its streets, called _____ street, 517, 520 (1883). _____ was negligently suffered by the

⁷ Chap. 167, page 979 of Pub. defendant to be out of repair. Stats. of Mass. (1882); Pub. Gen. whereby the plaintiff in travelling Laws of Maryland (vol. 2), p. on said street and using due care 1104, art. 75, § 36. _____ was hurt.” Pub. Gen. Laws of

⁸ *Ib.* “That the defendant is an Maryland (vol. 2), p. 1104, art. 75, incorporated city and is bound to § 37.

§ 422. **The same by a servant against a master.**— , contractors, a corporation of the State of New Jersey, the defendant in this suit, was summoned to answer unto , the plaintiff herein, in an action of tort, and thereupon the said plaintiff, by , his attorney, complains:

For that, whereas, the said defendant, before and at the time of committing of the grievances hereinafter mentioned, was, and still is, a corporation duly incorporated under the laws of the State of New Jersey, and whereas, heretofore, to-wit: On the 6th day of April, 1896, at Berry Creek, in the county of Bergen and State of New Jersey, the said defendant was engaged in dragging or snaking timbers out of a certain creek or body of water, which timbers were to be placed on top of piles, at or near the bank of said stream of water, and the said plaintiff was employed by the said defendant in and about its work of dragging or snaking timbers from the said stream of water to said bank;

And whereas, in so dragging or snaking timbers from said stream of water to said bank, it became and was necessary for the said plaintiff, at the request of said defendant and under instructions of the said defendant, to engage in and about the dragging or snaking and hoisting of a certain large timber of great weight into place upon piles driven down on or near the bank of said stream of water, and in so dragging or snaking and hoisting said timber, it became and was necessary for the defendant to use a rope, which was attached to the said timber at one end, and then passed through a certain block or pulley, attached to a derrick, and then connected with a certain drum on the engine;

And whereas, it became and was the duty of the said defendant towards the said plaintiff to supply reasonably safe and good appliances for the dragging or snaking and hoisting of said timber, and to supply a rope of sufficient strength and size to drag or snake said timber from said creek, and to supply a reasonably safe rope so that in the prosecution of said work the plaintiff should not be injured through the negligence of the defendant, and to supply a proper and safe block or pulley through which said rope ran, so that the said rope should not become frayed, and to keep said rope and pulley and appliances

in a reasonably safe condition, and to reasonably inspect the same;

Yet the said defendant, disregarding its several duties to the said plaintiff in this behalf, failed to supply a rope of sufficient strength and size or of sufficient soundness, or to supply a reasonably safe rope to perform the work of dragging or snaking and hoisting said timber, and failed to supply a reasonably safe or proper block or pulley through which said rope passed, so that said rope became frayed and failed to keep said rope and pulley in a reasonably safe condition, and failed to reasonably inspect the same, and so negligently and carelessly supplied a rope of insufficient size and strength and of insufficient soundness and caused the same to be used over a pulley of improper size, so that while the said timber was being dragged or snaked and hoisted out of said creek by means of said rope and block, the said rope broke and permitted the said timber to fall upon and strike the said plaintiff, while engaged in and about dragging or snaking and hoisting said timber, while the plaintiff had no knowledge of the said defective condition of said rope or pulley block, or of the appliances which should have been supplied in the exercise of reasonable care by the defendant, and thereby the said plaintiff was greatly injured in his head, limbs, body and mind, internally and externally, and by reason of the premises one of his legs was amputated, and he was otherwise greatly injured, and so remained for a long space of time, to-wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain and anguish of body and mind, and was thereby prevented from attending to and transacting his lawful affairs and business, and from earning and receiving large sums of money from his said business, which but for said injuries he would have earned and received.

And by means of the premises said plaintiff became permanently injured in his head, limbs, body and mind, and will so remain during the rest of his natural life, and by means of the premises the said plaintiff was forced to lay out and expend and has laid out and expended large sums of money in and about endeavoring to be healed of his said injuries.

Wherefore, said plaintiff says that he has been injured and suffered damages by reason of the negligence of the said defendant in the sum of \$50,000. And, therefore, he brings his suit, and so forth.

§ 423. The same by husband and wife, for injuries to the wife, by falling into an open areaway.— , the defendant herein, having been duly summoned to answer unto the plaintiffs herein, and , his wife, in an action of tort, and thereupon the said plaintiffs, by , their attorney, complain:

For that the said defendant, on or about the 19th day of February, in the year 1897, illegally and negligently made, kept and maintained on a certain public street or highway in the city of Jersey City, which said street or highway is known and designated as Monmouth street and is in the city of Jersey City, in the county of Hudson, a certain large, deep hole or excavation, which said hole or excavation, so kept and maintained by the said defendant, was a source of great danger to all persons travelling upon the said highway, and thereupon the said plaintiff, , on the day aforesaid, who was at that time the wife of the said plaintiff, , while walking upon the said street or highway aforesaid, and while using and exercising due care for her safety, and without fault on her part, fell into the said hole, which was unlighted and unguarded, and which was so kept and maintained by the said defendant, and was thereby, because of the negligence of the said defendant, greatly and permanently injured in body and mind, and has so remained to this day. And the said plaintiff, , has, because of the premises, been and now is deprived of the comfort, care, society and services of his said wife, to his damage \$5,000, and has been forced to lay out and expend divers large sums of money, endeavoring to obtain the cure of his said wife, to-wit, the sum of \$500,⁹ and the said plaintiffs say they are injured by reason of the premises to their damages \$10,000, and, therefore, they bring their suit, etc.

§ 424. The same for injuries received by falling into an excavation near a street.— , the defendant in this suit, was summoned to answer unto , the plaintiff therein, in an action of tort; and thereupon the said plaintiff, by , his attorneys, complains:

For that, whereas, the said defendant heretofore, to-wit, on the 7th day of January, 1895, at Jersey City, in the county of

⁹ See § 156.

Hudson aforesaid, was the possessor and occupier of a certain messuage and premises, with the appurtenances, in Jersey City aforesaid, and on and adjoining a certain public street in said city, known as Montgomery street, over and along which said public street the said plaintiff and all other persons might pass and repass at will, which said premises are known by the street number, as 306 Montgomery street.

The said plaintiff further avers, that on the day and year aforesaid, to-wit, at Jersey City aforesaid, the said defendant was erecting upon said premises a certain building, under and in front of which he had excavated, and caused to be excavated, a cellar of great depth, to-wit, of the depth of seven feet, which said cellar extended to the line of said street, to-wit, on the day and year aforesaid, at Jersey City aforesaid.

And the said plaintiff further avers that it then and there became and was the duty of the said defendant to so cover and protect the said cellar, that persons passing and repassing upon said public street would be safe and protected from danger of falling into or being otherwise injured by the said cellar.

Yet the said defendant, well knowing the premises, to-wit, on the day and year aforesaid, at Jersey City aforesaid, wrongfully and unjustly permitted the said cellar to be and continue so insufficiently and defectively covered and to be without railing or other efficient means to protect it, that by means of the premises, and for want of sufficient railing or other protection to said cellar, the said plaintiff, who was then passing along the said highway, then and there, by means thereof, slipped and fell into the said cellar, and thereby, then and there, broke his right shoulder, and strained and broke the ligaments and muscles therewith connected, and permanently injured the joint of said shoulder, and shocked and permanently injured his nervous system, and was made deaf and unable to hear, and was so troubled that a catarrhal trouble, from which he was suffering, was greatly increased and rendered permanent, and was otherwise badly bruised and injured in and about his head, ears, face, neck, arms, shoulders, body, hands, legs, feet, membranes and nerves and thereby became and was sick, sore, lame, deaf, diseased, weak and disordered, and so remained, and continued for a long space of time, to-wit, from thence hitherto, and during all of which time he, the said plaintiff, thereby suffered and underwent great pain, and was prevented from attending to and

transacting his necessary and lawful affairs and business, and was also, by means of the premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend a large sum of money, to-wit, the sum of \$1,000, in and to the endeavor to get healed and cured of the said wounds, sickness and disorder, and by means of the premises will be in the future permanently injured in his said shoulder and joint, and the muscles and ligaments connected therewith, and in his parts and organs of hearing, and will be rendered permanently deaf, and in his membranes, and will be rendered subject to a permanent catarrhal affection, and in his nerves, and will remain weak and shocked in his nervous system, and thereby will be permanently disabled from attending to his necessary affairs and business, which he would otherwise be able to attend to, to-wit, at Jersey City aforesaid.

Of all of which the said defendant aforesaid, to-wit, on the day and year aforesaid, had notice.

Wherefore, the said plaintiff says that he is injured, and has sustained damage to the amount of \$25,000, and, therefore, he brings his suit, etc.

§ 425. **The same for injuries received on a pier.**—The _____, a foreign corporation chartered by the Senate of the free Hanseatic city of Bremen, and doing business, and known and designated in the State of New Jersey as the North German Lloyd, the defendant in this suit, was summoned to answer unto _____, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by _____, his attorneys, complains:

For that, whereas, on the 24th day of August, 1898, the said defendant, previous thereto, was at that time, and still is, the owner, occupier and in possession of a certain pier or wharf, known and designated as Pier No. 2, located in the city of Hoboken, extending out into the Hudson river in said county of Hudson, which said pier was then and there occupied and used by the said defendant in connection with its business of running a steamship line from the city of Hoboken to the city of Bremen, and other foreign ports, on and over which passengers and persons then and there having business with the said defendant and access to and from the said steamships had to pass and repass, and did then and there pass and repass by invitation and direction of the said defendant in the prosecution of

its business of carriers of freight and passengers, and did then and there so use the said pier for transmitting the freight from said steamships to said pier, and did then and there load and pile the same on the said pier while then and there waiting to be hauled away by the consignees of the same, by reason of the said premises the said defendant was bound to so use said pier and so pile and handle said freight that it would not injure or damage persons there on business connected with the said defendant, such persons exercising due care for their own safety.

Yet the said plaintiff says, that on the said day, to-wit, the 24th day of August, 1898, he was then and there on the said pier, as by law he had a right to be, for the purpose of then and there handling, hauling and taking away some freight which had been, and was then and there deposited, stacked or piled on said pier by the said defendant for that purpose; and plaintiff further avers that the said freight, to-wit, lithographic stones of great weight and size, to-wit, of the weight of 500 pounds, were then and there so negligently, carelessly and improperly piled by the said defendant, one against the other, standing upright on ends, without being protected, so that when one of such stones was then and there withdrawn the others would then and there fall, and in such a manner that the danger of their falling was not known and could not then and there be seen by said plaintiff, but the danger of such falling was known, and should have been then and there known by the said defendant. That then and there, on the day aforesaid, some of the freight aforesaid, so piled as aforesaid, to-wit, a large lithographic stone, of great weight and size, did then and there, by the negligence of the defendant, fall upon said plaintiff, and did then and there, without any negligence or fault on his part, injure and damage the said plaintiff by breaking one of his legs, straining his arms and shoulders, and otherwise internally bruising and permanently injuring him, the said plaintiff, the said injuries to the said plaintiff being then and there caused to him without any fault or carelessness on his part, and wholly by the negligence, carelessness and fault of the defendant. By reason of the premises he was otherwise greatly injured and so remained for a long space of time, to-wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain and anguish of body and mind, and was thereby prevented from attending to and transacting his lawful affairs

and business, and from earning and receiving large sums of money from his said business, which but for said injuries he would have earned and received. And by means of the premises said plaintiff became permanently injured in his head, limbs, body and mind, and still so remains during the rest of his natural life, and by means of the premises the said plaintiff was forced to lay out and expend, and has laid out and expended large sums of money in and about endeavoring to be healed of his said injuries.

Wherefore, said plaintiff says that he has been injured and suffered damages by reason of the negligence of the said defendant in the sum of \$7,000. And, therefore, he brings his suit, etc.

§ 426. Form of an indictment against a railroad company for negligently killing a person at a highway crossing.—“That on the seventeenth day of December, eighteen hundred and seventy, the defendants, being proprietors of a certain railroad, etc., at Salem, in said county, by their servants in this State, to the jurors aforesaid unknown, did negligently and carelessly run a certain locomotive steam engine, and a certain train of cars, on said Manchester and Lawrence railroad, upon and across a certain public highway, at a place called Ballard’s Crossing, in Salem [here follows a description of the highway], on the grade or level of said highway, at a greater speed than six miles per hour, to-wit, at the speed of twenty-five miles per hour, and by the said negligence and carelessness of their said servants aforesaid did then and there, at said Ballard’s Crossing, surprise, overtake, strike and throw down one Benjamin Woodbury, of Salem aforesaid, yeoman, who was then and there not in the employment of said corporation, and was then and there peaceably and lawfully passing along said public highway at the crossing aforesaid, and him, the said Woodbury, thereby and by the negligent, careless and rapid running of the engine and cars aforesaid by the said servants of said railroad corporation, did then and there instantly kill [then follows an allegation that one A. B. is an administrator of the estate of deceased; that Sarah Woodbury is his widow, and that Hannah M. Gordon and others are his surviving children]; and so the jurors aforesaid, upon their oath aforesaid, do say that the life of the said Benjamin Woodbury, he being then and there a person not

in the employment of said corporation, was lost as aforesaid, by reason of the negligence and carelessness of their servants aforesaid, in this State, contrary to the form of the statute, etc.

“The second count alleges that the defendants did negligently and carelessly omit to erect gates, or to place signals, notices, watchmen or guards at a certain dangerous crossing in said Salem, called Ballard’s Crossing, where said Manchester and Lawrence railroad crosses a certain public and frequented highway at the grade or level thereof. [Here follows a description of the highway.]

“And by the agents and servants of the said Manchester and Lawrence railroad corporation in this State, to the jurors aforesaid unknown, at the crossing aforesaid, in Salem aforesaid, on the seventeenth day of December aforesaid, did, with gross negligence and carelessness, and unlawfully, run a certain locomotive steam engine and a certain train of cars, all of the proper goods and chattels of said Manchester and Lawrence railroad corporation, upon the said Manchester and Lawrence railroad, across said public highway at said Ballard’s Crossing, at the grade or level of said public highway, at a greater speed than six miles per hour, to-wit, at the speed of twenty-five miles per hour, and did then and there, by the gross negligence and by the carelessness of the said corporation, and of their agents and servants aforesaid, in this State, omit to give suitable and proper notice of the approach of said engine and train to said crossing, so that, at the crossing aforesaid, the said engine and cars did suddenly surprise, overtake, strike and throw down one Benjamin Woodbury, of Salem aforesaid, yeoman, who was then and there not in the employment of said corporation, and was then and there peaceably riding and passing in a wagon, drawn by two horses, along the said public highway at the crossing aforesaid, and him, the said Benjamin Woodbury, did then and there mangle and kill, by which gross negligence and carelessness of said corporation, and of its agents and servants aforesaid, the life of the said Benjamin Woodbury was then and there lost as aforesaid [then follows a statement of the administrator, widow and children of the deceased, as in the first count]; and so the jurors aforesaid, upon their oath aforesaid, do say that the life of the said Benjamin Woodbury, he being a person not then and there in the employment of said corporation, was lost as aforesaid, by reason of the negligence and care-

lessness aforesaid of the said corporation, proprietors of the railroad aforesaid, and by the unfitness and gross negligence and by the carelessness of the agents and servants aforesaid of said corporation, in this State, contrary to the form of the statute, etc.

“ The third count alleges that the defendants, by their agent or agents, servant or servants, in this State, to the jurors aforesaid unknown, did, by reason of the negligence and carelessness of said corporation, and by the unfitness and gross negligence and by the carelessness of their servants and agents in this State, to the jurors aforesaid unknown, so mismanage the said Manchester and Lawrence railroad, and so neglect to place proper gates, fences, guards and watchmen, and did so neglect to give proper notice, warning and signals of the approach of the engine and train hereinafter mentioned, and did so improperly, rapidly, recklessly and furiously run and drive the same, that on the seventeenth day of December last past, at Salem, a certain locomotive steam engine and a certain train of cars drawn thereby, all belonging to said corporation, and run and driven then and there by the said servants and agents of said corporation, at a place in said Salem called Ballard’s Crossing, where said railroad crosses at a grade a public and frequented highway [here describe the highway], did, with great speed and violence, suddenly overtake, run against and strike the wagon and person of one Benjamin Woodbury, of Salem aforesaid, yeoman, the said Woodbury not then and there being in the employment of said corporation, and being then and there peaceably and lawfully driving a pair of horses attached to a wagon, over said crossing and along said public highway, and him, the said Woodbury, by the said negligence and carelessness of the said corporation, and by the said unfitness and gross negligence, and by the said carelessness of their servants and agents aforesaid, in this State, did then and there injure, bruise, wound and mangle, in his limbs, body and head, of which injuries, bruises, woundings and mangling, he, the said Woodbury, then and there died [here the administrator, widow and children of the deceased are described]; and so the jurors aforesaid, upon their oaths aforesaid, do say that the life of the said Woodbury, he being a person not then and there in the employment of said corporation, was lost as aforesaid, by reason of the negligence and carelessness aforesaid of the said corporation,

proprietors of the said railroad as aforesaid, and by the unfitness and gross negligence, and by the carelessness of the servants and agents aforesaid of said corporation, in this State, contrary to the statute," etc.¹⁰

§ 427. Pleas — General issue — Special pleas — Statute of Limitations — Payment — Release.— *General issue.*— And the said defendant, the _____, by _____, its attorneys, comes and defends the wrong and injury when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, etc. See § 164.¹¹

Payment (first plea, general issue).— Because he says that, after the committing of the said grievances as aforesaid, and before the commencement of this suit, to-wit, in, etc., at, etc. [*venue*], he, the said defendant, paid to the said plaintiff the sum of _____ dollars, for and in full satisfaction and discharge of the said grievances in the said declaration mentioned, and which said sum of _____ dollars he, the said plaintiff, then and there accepted and received of and from the said defendant, in full satisfaction and discharge of the said grievances. And this, etc. [Conclude with a verification.] See § 165.

Statute of Limitations (first plea, general issue).— Because he says, that the said several supposed causes of action, in the said declaration mentioned, did not, nor did any or either of them, accrue at any time within six years next before the commencement of this suit, in manner and form as the said plaintiff hath above thereof complained against him, the said defendant. And this, etc. [Conclude with a verification.] See § 165.

Release.— Because he says, that after the grievances in the said declaration mentioned were committed, and before the

¹⁰ *State v. Manchester, etc., R. Co.*, 52 N. H. 528, 530 (1873). defendant, or its attorney, a particular account in writing of the nature of the claim in respect to

¹¹ *Demand for particulars in actions for causing death.*— Pursuant to the statute, we request of the plaintiff to deliver to the defendant which damages are sought to be recovered in this action. See § 161.

commencement of this suit, to-wit, on, etc., at, etc., aforesaid, the said plaintiff, by his certain writing of release, sealed with his seal, and now shown to the said court here, the date whereof is a certain day and year therein mentioned, to-wit, the day and year last aforesaid, did demise, release and forever quit-claim unto the said defendant, his heirs, executors and administrators, the said several promises and undertakings in the said declaration mentioned, and each and every of them, and all sum and sums of money then due and owing, or thereafter to become due, together with all and all manner of action and actions, cause and causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, or otherwise howsoever, which he, the said plaintiff, then had, or which he should or might at any time or times thereafter have, claim, allege or demand against the said defendant, for or by reason or means of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release; as by the said deed or writing of release, reference being thereunto had, will fully appear. And this, etc. [Conclude with a verification.] See §§ 165, 312.

Special plea.— And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such cases made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action therefor against it, because it says that the said defendant is a railroad company and common carrier within the Commonwealth of Pennsylvania, and was incorporated as such for that purpose and with such powers in and by a certain act of the General Assembly of the Commonwealth of Pennsylvania, entitled “An act to incorporate the Pennsylvania Railroad Company, approved the thirteenth day of April, one thousand eight hundred and forty-six.”

That by an act of the General Assembly of the Commonwealth of Pennsylvania, entitled “An act relating to railroad companies and common carriers, defining their liabilities and authorizing them to provide means of indemnity against loss of life and personal injury, approved the fourth day of April,

A. D. one thousand eight hundred and sixty-eight," it was enacted, among other things, as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon of which company such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe; *provided*, that this section shall not apply to passengers * * *.

"Sec. 4. That all acts or parts of acts inconsistent herewith be and the same are hereby repealed, and any provisions in the acts incorporating such common carriers or corporations inconsistent herewith shall be repealed upon the acceptance of the provisions of this act by such carriers or corporations, and upon the acceptance of the provisions hereof by any carrier or corporation the same shall become a part of its act of incorporation."

And the defendant avers that by an acceptance duly passed and adopted by the board of directors of this defendant on the 15th day of April, A. D. 1868, this defendant did duly accept the said act last above mentioned and entitled as aforesaid, and did duly file its acceptance in the office of the secretary of the said Commonwealth of Pennsylvania, at Harrisburgh, on the 8th day of June, A. D. 1868, and this defendant avers that at the time of the commission of the said supposed grievances in the said declaration mentioned and whereof the said plaintiff hath complained against it, the said defendant, if any such there were, the said plaintiff was not a passenger, but was a mail clerk, employed in and about a certain mail car of the United States Government, which was then and there in and part of a certain train of the said defendant, the Pennsylvania Railroad Company, which said train was within the Commonwealth of Pennsylvania, and was then and there, as such mail clerk, engaged and employed in and about the said train and mail car, and that the said injuries and damages, if any there were then there sustained and suffered by the said plaintiff, were suffered and sustained within the Commonwealth of Penn-

sylvania, and were by the negligence of certain of the employes of the said defendant, the Pennsylvania Railroad Company, in the course of a common employment with said plaintiff; therefore, under and in accordance with the said act of the Commonwealth of Pennsylvania, approved the 4th day of April, 1868, above referred to, the said employes of this defendant, the Pennsylvania Railroad Company, were fellow employes with said plaintiff in the course of a common employment, and this the said defendant is ready to verify; wherefore, it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, etc. See § 165.

CHAPTER XVI.

PRACTICE — EXCEPTIONS — REQUESTS TO CHARGE — CHARGES IN FULL BY TRIAL JUDGES.

- § 428. Dismissing complaint — Nonsuit — Directing a verdict — Exceptions.
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- 445. Charge by Mr. Justice Lippincott, of the Supreme Court of New Jersey, action by a postal agent.

§ 446. Charge by Mr. Justice Dixon, of the Supreme Court of New Jersey, action for injuries caused to the plaintiff, while alighting from a car of a street railroad.

§ 447. Charge by Mr. Justice Dickey, of the Supreme Court of New York, action for injuries received while crossing the tracks of a steam railroad.

§ 428. **Dismissing complaint — Nonsuit — Directing a verdict — Exceptions.**— It is not intended in this section to do more than state those general points which have particular application to the trial of accident cases. The practice in the trial of accident cases is the same, and is governed by the same rules and statutes as the trial of other civil cases. The practice and rules of the court in each jurisdiction will, of course, have to be followed, for which books on local practice and statutes should be consulted. The trial of accident cases has become such an important part of the business of the courts, in the past few years, in nearly all the States, that some general points of practice applicable to this class of cases and to all jurisdictions have been developed by the courts. A statement of some of these general points may prove useful for a ready reference in the trial of accident cases.

First. In the Code States the most usual motion made by the defendant, at the close of the plaintiff's case, is to *dismiss the complaint*.¹ In the States where the common-law practice is adhered to, the motion is that the defendant move for a *nonsuit*,² that is, that the plaintiff be called to make a better case and in default thereof, judgment of nonsuit be entered against him. These motions are usually based on the grounds: 1. That the evidence offered and proofs made by the plaintiff do not support the allegations of the complaint, declaration or petition, *i. e.*, that there is a fatal variance between the allegations in the pleadings and proof. 2. That the plaintiff has not shown, by evidence, any liability or negligence on the part of the defendant, *i. e.*, that the injuries complained of by the plaintiff were not caused by the negligence of the defendant.

¹ A motion to dismiss, because the plaintiff, by his pleadings, does not prosecute his action." showed no good cause of action, See Co. Litt. 138b. may be made at any time. *Mad-dox v. County of Randolph*, 65 Ga. 216 (1880).

² Norman-French — *Nonsue*: "He

Second. That the plaintiff's injuries, as shown by the evidence, were caused by the negligence of a fellow servant.

Third. That the plaintiff's injuries, as shown by the evidence, were caused by the contributory negligence of the plaintiff.

Fourth. In those jurisdictions which require the plaintiff to show, as part of his case, that he was free from fault, that he has not shown by evidence his freedom from contributory negligence.

Fifth. In actions brought under the statute for causing the death of a human being, that the plaintiff has not made out a case within the terms of the statute, giving the right of action; such as, that there is no proof of beneficiaries in existence who are entitled to bring the action, or that there is no proof of a deprivation of pecuniary loss,³ within the meaning of the statute, and the like.

§ 429. **Requests to charge.**— "Safety gates, which should be closed in case of danger, if standing open, are an invitation to the traveller on the highway to cross, and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances." Held, that such proposition was correct.⁴ "The plaintiff was guilty of contributory negligence if she did not see the step or cellar-way into which she fell, provided she would have seen it by exercising ordinary care, and seeing it she was guilty of contributory negligence in not avoiding it, provided she could have avoided it by exercising ordinary care."⁵ "That as a matter of law, the

³ Wabash R. R. Co. v. Cregan, Ind. App. ; 54 North E. R. 767 (1899).

⁴ Roberts v. Delaware, etc., Co., 177 Pa. St. 183, 190 (1896).

⁵ Quimby v. Filter, Vr. (1899, N. J.):

"1st. That it is the duty of the defendant city to keep its sidewalks in safe condition and free from defects and obstructions dangerous to persons passing along the same with ordinary care; and the

defendant is liable to a person who sustains injury, without fault on his part, by reason of its neglect so to do.

"2d. And if the jury believe from the evidence that the sidewalk where the plaintiff was injured was uneven, out of repair or fit condition for any reason, and dangerous to persons passing along the same with ordinary care, and that the defendant, or its officers or agents knew, or ought to

defendant, in the use of its railroad, was only called upon to give such signals of the approach of trains as the legislature had

have known, of its condition, and that the plaintiff, in passing along the said sidewalk with such care as an ordinarily prudent man would have observed, fell thereon by reason of its defective condition and was injured, then they must find for the plaintiff.

"3d. The plaintiff had the right to assume that the defendant would perform its duty in keeping the sidewalk in the declaration mentioned in safe and proper condition, and he was required to exercise only ordinary care in passing over the place where the accident occurred, unless he knew of its dangerous condition, or might have seen it by the exercise of the care ordinarily observed by the citizens in walking along the sidewalks of the city; he was not required to anticipate danger, nor to be on the lookout for its existence.

"4th. The jury are instructed that the burden of proving contributory negligence is upon the defendant, if that defense is relied upon, and it may be proved by affirmative testimony, or may be deduced from all the evidence in the case; but the defense must be established by a preponderance of the evidence in favor of the defendant.

"5th. The court instructs the jury that it is the duty of the city to make and keep its sidewalks reasonably safe for public travel, and that if it fails in the discharge of this duty it is liable to persons sustaining injuries because of such failure. And if the jury believe from the evidence that the sidewalk in question, where the plain-

tiff fell and sustained the injuries complained of in his declaration, was not in such reasonable repair, then they must find for the plaintiff the damages they believe him to have sustained, unless they shall also believe, from the evidence, that the plaintiff, by his own negligence, or want of ordinary care and caution, so far contributed to the misfortune, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened.

"6th. The court instructs the jury that the degree of care and caution required of the plaintiff in such cases would depend upon the degree of his knowledge and information concerning the defective or unsafe condition of the sidewalk in question."

These instructions correctly propounded the law applicable to the case and they should have been given to the jury. *Gordon v. The City of Richmond*, 83 Va. 437 (1887).

"(1) The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and maintain its streets and sidewalks in good and sufficient repair to render them reasonably safe for all persons passing on or over the same; and if the jury believe, from the evidence, that the defendant failed to use all reasonable care and precaution to keep its sidewalk in such repair, and that the injury complained of resulted from that cause as charged in the declaration, and that the plaintiff sustained damage thereby, without

prescribed, unless the crossing in question had some peculiarly dangerous feature occasioned by the act of the company itself in constructing its road or buildings.”⁶ “As respects the duty of a master or employer towards his servant or employe in his service, the court instructs the jury, as a matter of law, that the master or employer is not bound to provide machinery or appliances which are absolutely safe. The law imposes on the master or employer only the obligation to use reasonable and ordinary care, skill and diligence in procuring and furnishing suitable and safe machinery and appliances for the servant to perform the duties for which he is engaged. The master does not stand in the relation of an insurer to the servant against injury, and can only be held chargeable when negligence can be properly imputed to him. The mere fact that an accident occurred, by which the plaintiff was injured, does not fix the liability or even raise a presumption, that the defendant was at fault in procuring machinery or appliances for the labor, in which the plaintiff was engaged.”⁷

negligence on his part, then he is entitled to recover in this suit.

“(2) The court further instructs the jury that a traveller on a public street is held to the exercise of only ordinary care. Slight negligence, which is a want of extraordinary care, will not defeat a recovery for an injury received in consequence of a defect in a public street or highway, provided the evidence shows that the city authorities were guilty of negligence in permitting the defect to exist, and that the traveller was injured thereby, and was using ordinary care to avoid the injury.”

These instructions correctly propound the law, and ought to have been given. *Moore v. City of Richmond*, 85 Va. 541 (1888). In *Cook v. Central R. R. Co.*, 67 Ala. 533 (1880), it was held error to refuse to charge “that if defendant’s agents did see, or by the exercise of proper care could have seen,

plaintiff’s intestate upon said bridge or trestle in time to have stopped said train before it reached him, and that they failed to stop, the defendant was liable.”

⁶ *Philadelphia &c. R. R. Co. v. State*, 32 Vr. 72 (1897). See *Pennsylvania R. R. Co. v. Matthews*, 7 Vr. 533 (1873). It is error to instruct a jury that omission of the defendant to give the signals required by the statute is *prima facie* evidence of negligence. *Chicago &c. R. R. Co. v. Brady*, 51 Neb. 758 (1897). For requests to charge where one was killed on a railroad track, see *Frazer v. South &c. R. R. Co.*, 81 Ala. 185 (1886). Duty of judge to charge, when requested, so as to convey the same ideas without doubt or confusion. *Mitchell v. Turner*, 149 N. Y. 39 (1896); *Illinois Central R. R. Co. v. Slater*, 129 Ill. 91 (1889).

⁷ Held correct, and error not to have given such instruction to the

§ 430. **Charges by the trial judge — Exceptions.**— It is an elementary principle, applicable to the trial of causes with a jury, that the object of instructions is to convey to the minds of the jury, correct principles or rules of law, applicable to the evidence which is before them, and giving instructions that are obscure and calculated to mislead the jury are reversible error;⁸ so a judgment will be reversed for a charge which is inadequate.⁹ An instruction is not only required to state correct legal principles, but it should so state them, that the jury may be able to apply them, to the particular evidence to which they are germane.¹⁰ A trial judge, although requested by counsel, is not required to charge abstract legal principles not applicable to the facts appearing in evidence.¹¹ But if there is evidence tending to prove the facts upon which an instruction is based, and it correctly states the law applicable to such state of facts, the instruction should be given.¹² The giving of an instruction not based upon the evidence, or anything in the record, is improper, and when the instruction was misleading, it constitutes reversible error.¹³ Instructions to a jury should generally be limited in their scope to the issues presented by the pleadings.¹⁴ Comments on the evidence, in a charge to a jury, are not assign-

jury. *Brymer v. Southern Pacific Co.*, 90 Cal. 497 (1891). So the following was held to be a correct proposition of law: "It was the duty of the defendant in this case to have used ordinary care and prudence in furnishing to the plaintiff, at the time of the accident, a reasonably safe place in which to work, and to have used all reasonable precautions to maintain and keep such place in a reasonably safe condition." *Libby v. Scherman*, 146 Ill. 552 (1893).

⁸ *Gordon v. City of Richmond*, 83 Va. 436 (1887).

⁹ *Cooley v. Philadelphia Traction Co.*, 189 Pa. St. 563 (1899).

¹⁰ *Abbitt v. Lake Erie &c. Ry. Co.*, 150 Ind. 498 (1898).

¹¹ *Consolidated Traction Co. v.*

Haight, 30 Vr. 577 (1896); *Chicago &c. Ry. Co. v. Ingraham*, 131 Ill. 659 (1890).

¹² *Washington Southern Ry. Co. v. Lacey*, 94 Va. 460 (1897). It is not error to refuse a requested instruction which is substantially embodied in the charge of the court. *Clark v. Bennett*, 123 Cal. 275 (1899).

¹³ *Robinson v. Denver &c. R. R. Co.*, 24 Colo. 98 (1897).

¹⁴ *Atchison &c. R. R. Co. v. Powers*, 58 Kan. 544 (1897). Although an instruction is not couched in the exact language used in the petition, yet if that is substantially done, and it is not an enlargement thereon, it is not error to give it. *Baird v. Citizens Ry. Co.*, 146 Mo. 265 (1898).

able as error, if the facts are left to the jury. It is only when a material fact is stated as in proof, when there is no evidence at all to support the statement, that there is legal ground of complaint in this regard.¹⁵ But it is error for the court, in its charge, to assume any material fact, as established, about which there is a controversy in the evidence, however strong the evidence may be on the one side, or however weak on the other.¹⁶ If a trial judge fails to charge on some point which counsel regard as essential, the attention of the judge should be called to it before the jury retire, and more specific instructions requested.¹⁷ Omission of a trial judge to instruct a jury on a particular point is not assignable as error, unless such instruction be specially requested.¹⁸

§ 431. Charge by Mr. Justice Knapp, of the Supreme Court of New Jersey, action for causing the death of a minor, a servant.—

GENTLEMEN OF THE JURY: This class of cases arises out of statute alone. An action of this sort is no part of the methods of the common law. Prior to 1848 no such action as this would have lain here. Where, by the negligence or fault of another, death ensued, no civil cognizance in the courts was taken of such an injury. It was relegated always to the criminal side of the court. But this, in England, and in most of the States in this country, was regarded as a defect in the law and a remedy was provided in all, or nearly all, of the States, and in England, substantially like that that we have on our statute book. It is, in substance, that wherever death results from the neglect, default or wrong of another under such circumstances that an action would have lain for the injury, or for the neglect or wrong, if death had not ensued, the personal representatives of the person so losing his life shall have their remedy by action. And the statute has carefully measured

¹⁵ Camden &c. R. R. Co. v. Williams, 32 Vr. 646 (1898).

¹⁶ Gulf &c. Ry. Co. v. Finley, 11 Tex. Civ. App. 64 (1895).

¹⁷ Kehoe v. Allentown &c. Trac-tion Co., 187 Pa. St. 474 (1898). So, objections to a charge must point out specifically to the trial court, the points to which objections are

made, in order to have the benefit of the objections. Baltimore &c. R. R. Co. v. Mackey, 157 U. S. 72 (1895).

¹⁸ Camden &c. R. R. Co. v. Williams, 32 Vr. 646 (1898). See Sackett's Instruction to Juries; Proffat on Jury Trial, § 311 *et seq.*

the extent to which that remedy shall go in the way of damages. I do not mean by that, that a very definite rule is given, because, unfortunately, that is not so; perhaps it is impossible that it should be so. The rule of damage in such cases, I think, may fairly be said to be quite vague, depending so much upon conjecture and not upon definite data. But in order to give damages more than nominal, in a case of this sort, where the action is maintainable, there must be some evidence to show, that the next of kin in some pecuniary way were interested in the continuance of the life of the decedent. It is upon that ground and within that limit that damages are given. Damages are not given for the cost of burial, for the cost of attendance on the person injured if he continues for a time in life, nor is any damage given of a punitive character; it is simply remunerative, and that remuneration is to be that sum which will meet the reasonable expectation that the next of kin had, of pecuniary benefit arising from the continuance in life of the person who was killed. What would the next of kin in all reasonable probability have been advantaged pecuniarily by the continuance in life of this young man? That is the question in determining damages, and you see in its nature it is quite uncertain. Where it plainly appears that, through legal liability, legal duty, the decedent was called upon to contribute to the next of kin, any of them, there you would have some certain ground to stand on, and that ground is here in part of the claim which the plaintiff makes. There is a right in a parent to have the services of unemancipated children, minor children. If he lets them go from him he abandons that right. He may do so at his pleasure, but before emancipation, during minority, he has the right to their services, but he has cast upon him the corresponding duty of education and support. The one may balance the other; the cost may exceed the profit, the profit may exceed the cost; and whether it will be the one way or other will depend on the circumstances in the case. Here, it seems, this young man was contributing to the support of his father's family, and that is ground on which the jury can estimate damages, if you come to that question; but in doing so you must take into account the other circumstances that I have mentioned, that there was the duty of support and education on the father against that which decedent provided for the family. You are also to take into account the possibility of

his being out of employment, the possibility of the father emancipating him for a time, putting him to another for a time to service; you will recall the suggestions in the case of the father putting him to a trade, and possibly in that event the contribution to the family would be diminished. Nor is it limited to the period of minority; it may even go beyond that if there is evidence before the jury from which they can fairly infer, that beyond that time there was a reasonable probability of pecuniary gain if he continued in life. But before you reach that point you will be required to answer other questions upon the evidence in the case which lie at the foundation of the action. The statute says, in substance, there may be a recovery where an action would have lain in the decedent, had he not died. And that is the test, whether a recovery should be had here. Would there have been ground of recovery had the young man been here in life suing for the injury?

The plaintiff rests his case upon the theory that the decedent, an employe of the defendant, came to his death through the use of machinery furnished to him by the defendant to be used in his service, in which there were latent defects endangering him in their use, such dangers and defects not being disclosed to the employes. This, if established, gives ground for recovery. The master is bound in the law to use reasonable diligence and care to provide safe and suitable machinery and means for his servants' use in his employment, and a failure to do so, resulting in injury or death to the employe, is ordinarily ground of action. Suitable machinery does not necessarily mean such as is harmless and safe in its nature, for very much of the machinery in daily use has dangerous qualities, and, notwithstanding that, it is lawfully used. The locomotive is a dangerous thing. I think it may be said of nearly all machinery driven by power that there is more or less danger attending its use and yet it may lawfully be used. The law is that anyone engaging in the use of machinery, such machinery, dangerous in its nature and character, takes the ordinary risks from these qualities as an incident to his employment. Where the danger is open and obvious, such as the employe can see for himself or can discover in the exercise of ordinary care for his own safety, the servant who consents to use it or engages himself to work with it or near it, takes all the risks of danger to himself that may arise from such obvious defects.

When the machinery necessary to perform the business of the employer is perilous in its nature and quality, the master is, however, still charged with the duty towards those who serve him, to exercise reasonable diligence, to see that such are provided as will not expose the servant to unreasonable or unnecessary or unwonted risk of life or limb. This rule is founded in justice and sound policy, and it is especially important where the servant is young and inexperienced in the use of dangerous appliances. And there is another rule of equal importance to individuals and the public, and that is where persons without experience in the use of instruments of a dangerous character are employed in service which exposes them to peril; it is the duty of the employer to give proper notice and warning against those dangers to which the employe is exposed, in order that the proper care may be used to avoid them, or that the servant may, being warned, decline to go into the dangerous service. The employe has the right to be informed of latent dangers undiscoverable on observation; it is his right to be informed what the dangers are. He should be made to understand the danger, and I mean by that the precise danger. A general statement to one in entire ignorance of concealed danger that the thing is dangerous would scarcely serve the requirements of the law as a warning, because of the quality of the danger, its nature should be pointed out, the object being that the employe may avoid the dangers, or, if unwilling to take the risks, he may decline to serve altogether. Therefore, he should have some specific warning of the quality, the character, of the risk which he is to run. If the employe has such notice given him, either expressly given to him or what is the same in effect, if he has had such experience and opportunity in their use, as to find out the peril, as fairly justifies the conclusion that he must have become apprised of the dangerous quality, he then continues in the service at his own peril, and if harm comes to him, he must bear it.

An employer is not bound to procure the best machinery. If this rule were otherwise, employers would be put to their wits' ends to save themselves from liability, from cost, from pure accidents. Who should tell which was the best machinery? In one case of an accident, a jury would find that the machinery was not the best; and in another case, before another jury, where accident had happened from the use of other ma-

chinery, a jury would find that that machinery was not the best, but the other. It is not the rule that men are bound to employ the best machinery. He may furnish any machinery that is suitable and fit, provided its dangers and defects are open and visible, and if hidden and secret, he gives full and ample notice of their dangerous quality to one who is employed. When such notice is given, even though it be dangerous, if it be not the best, he who continues in the employment after such notice takes the risk. A man is only obliged to use reasonable care and diligence in the selection of that which is suitable to his work.

Employers do not insure the lives or safety of their workmen. All they are bound to is not to be negligent. When they go in the market and exercise a fair judgment in the selection of their machinery fitted for their uses, they have performed all the duty which can be, with reason, required of them by the court and jury. Where the master knows of dangers or defects, or in the exercise of ordinary care should know of them, then, if the defects and dangers are not open and obvious to his employes, it is his duty to point them out to one who does not know of the existence of such dangers. If he does not so point them out, and injury results, the negligent master must respond in damages. If he does point them out, and proper caution given to the servant, or if, as I have intimated, the servant, by experience in the use of machinery, must have become familiar with its dangers, then he takes the risk. Every servant assumes all the risk ordinarily incident to the employment — all such dangers as are open to observation. He does not take the risk of hidden, undisclosed peril which the master is in duty bound to guard him against by notice.

There is another branch of this case which is put by counsel, and that is that the decedent in this case was chargeable with negligence on his own part which tended towards his injury. This always makes a defense, if it be shown. It may appear from the circumstances of the case, and usually does so when it is made apparent. The rule is that when the servant is in part responsible for his injury through his own want of caution, although the master may also in part be chargeable with negligence, no remedy is given in the law. We are not permitted to say whether one or the other is most in fault. If both are somewhat in fault in the matter causing the injury complained

of, neither can call on the other for damages. Contributory negligence, however, must be proved. In order to a recovery there must be negligence of the defendant, resulting in injury to the party complaining, or in this case to his representatives, and there must be the absence of any fault tending to that injury on the part of the person so injured or killed. If there be no negligence of the defendant, of course there can be no recovery. It is a faultless plaintiff, in respect to the injury, and a faulty defendant, that gives the ground of action.

Now, the particular ground on which this case is put is narrowed to this, that in the one machine, the mode by which it was driven, there was the absence of a loose pulley, which, it is said, would have obviated the constant risk of the belt running off, and, therefore, the constant risk and danger attending the replacing of it. This form of driving a pulley was obvious to anyone who was there engaged, who had the capacity to judge anything of machinery. It was a fact that could be seen. The defendant had the right, if he saw fit, to have that sort of machinery. If having that kind of machinery made its use more dangerous, and by reason of that greater danger injury resulted, then if the jury should find that the *danger* was not obvious—I do not say the means of danger—but the danger resulting, was not obvious, the plaintiff in this case would be entitled to recover, unless notice was given to the decedent of the nature and quality of that danger, which did result in injury to the decedent, if defendant knew or ought to have been aware of it. The injury and death must be the result of the thing in which the defendant is negligent; the result of the hidden thing, the result of the thing which the defendant was in duty bound to disclose to the decedent. If there were hidden dangers of which defendant knew, or should have known, incident to the putting on of this belt connected with this peculiar machinery or arrangement, if it were peculiar, and they were not obvious to a young man of the age and discretion that this one seems to have been, and they were not disclosed to him with such certainty as would enable him, in the exercise of care for himself, to comprehend the character of the danger to be avoided, then there would be a liability. If there were dangers, and they were discoverable with ordinary care, or if the defendant pointed out the danger, so that the employe could avoid it, then if he continued, it was his own risk, and there could be no recovery.

You take the case and see whether there is liability under these rules, and if so, you assess the damages according to the instruction that the court has given you. If there is no such liability, your verdict will be for the defendant.

§ 432. Charge by Mr. Justice Dixon, of the Supreme Court of New Jersey, action by a servant.— GENTLEMEN OF THE JURY: On the 7th of December, 1893, the plaintiff was in the employ of the defendant, and while engaged in doing the work that he was hired to do, upon the top of this platform ladder which has been spoken of, he fell and was injured, and by this suit he seeks to recover compensation from the defendant for the injury that he then sustained. In order that he may succeed in the suit, the evidence must satisfy you that he fell because the defendant had failed to do his duty towards him, as its employe. Now, what was that duty? That, of course, is the first question, for unless you know what that duty was, you cannot tell whether the evidence indicates that there was a failure to perform a duty. That duty was not to furnish the plaintiff with safe appliances with which to do his work — that is not the true legal form in which the duty is to be expressed — it was not the duty of the company to furnish him with safe appliances. The employer does not insure the safety of its appliances, but this is the true expression of the duty of the employer towards the employe that he shall exercise reasonable care and skill for the furnishing of safe appliances; that is what his duty is, namely, he shall exercise reasonable care and skill to furnish to the employe safe appliances for the performance of his work. That is his duty, and the question for you is, does the evidence indicate that this employer, the Alexander Dye Works, failed to discharge that duty towards the plaintiff? The plaintiff insists that the company failed to exercise such skill and care in the providing of this platform ladder, and that by reason of defects in this platform ladder, which would have been prevented if the employer had exercised reasonable care and skill, he tumbled down and was hurt. Now, that is the only ground on which you can find a verdict for the plaintiff, for if you believe that the plaintiff fell because, not of defects in the platform ladder, but because of some defect in this rail which was overhead, then the court charges you that you should not find a verdict for the plaintiff, for there is not any evidence

in the case tending to show any lack of reasonable care and skill on the part of the company — with reference to these rails, so the court charges you that in this case, if you find a verdict for the plaintiff it must be upon the ground that there was some defect in this ladder against which the exercise of reasonable care and skill on the part of the company would have guarded. Now, of course, reasonable care and skill to furnish safe appliances includes also reasonable care and skill to make proper inspection of the appliances that are furnished, for appliances may be perfectly safe or may seem to be perfectly safe, when they are furnished in the first instance, but we all know that such appliances wear out, and it is the duty, therefore, of the employer not merely in the first instance to use proper care and skill to see that the appliances are safe, but he is bound also to make reasonable provision for examination and inspection with a view of performing this duty, which it owes the employe, namely, the duty of exercising reasonable skill and care always to have safe appliances for his employe to use. Now the plaintiff says, that if the company had made proper provision for an inspection of this ladder as often as it ought to have been inspected, in view of the length of time that it had been in use, the kind of use it was subjected to and the atmosphere in which it was used, it would not have had the defect which the plaintiff says caused it to break and him to tumble. Now, if you find that under that rule the company did its duty, then you stop there, and find a verdict for the defendant. If you find that the company did not perform all its duty, and that through that failure defects existed, and the ladder broke, and the plaintiff fell, you do not then necessarily conclude that the verdict is to be found in favor of the plaintiff, but you proceed to another inquiry and that is this: Does the evidence satisfy you that the plaintiff did not do his duty in that matter? Well, what was his duty? It is a perfectly plain duty — the duty upon which we act every day, to exercise reasonable care and look out for his own safety. In a general way he knew what sort of an apparatus he was using — it was open to his inspection, and in a general way he knew what it was that he was employed on; whatever defects there were in that apparatus that were patent to reasonable observation, he is chargeable with the knowledge of; if it was generally shaky, why, in the use of it for fifteen days he couldn't be ignorant

of that condition, and whatever there was open to ordinary observation he was chargeable with the knowledge of, and then with that knowledge, he was bound to take reasonable care for his own safety, and if he neglected to take reasonable care for his own safety, if he, in the use of the apparatus, did what a reasonably prudent man would not do, and the accident happened in consequence, why he cannot recover in this case because the law is just as well settled as the obligation of a man to pay his promissory note is — that if an accident happens to a man because of somebody else's negligence, and his own negligence helps to cause it, he cannot recover — he has no remedy; so, gentlemen, those are the two inquiries that you are to make. First, does the evidence satisfy you that the company failed to discharge its duty of exercising reasonable skill and care to provide safe apparatus, and to keep the apparatus in safe condition? Secondly, does the evidence indicate that the plaintiff also failed to take proper care of himself? If you find the first proposition against the plaintiff you find your verdict for the defendant. If you find the second proposition against the plaintiff you find in favor of the defendant. You must find both propositions in favor of the plaintiff in order to come to a conclusion in his favor. Now, if you find a verdict for the plaintiff, then you come to the question of damages, and the plaintiff is entitled to receive compensation for the injury. The law cannot measure it exactly — our legal theory has no better means; perhaps, no better means can be devised for determining how much compensation should be made to a man for an injury of this kind, than the cool judgment of twelve sensible men, selected out of the community to decide that without feeling and as well as your judgment will enable you to do it. You ought to take into consideration the pain that the man suffered, his loss of time, his disability in the past and the probable disability and discomfort to which he will be subjected in the future. The law does not ask you to make guesses as to the future, but asks you to look at what is probable in the future — not what is certain, but what is probable — and to base your verdict upon consideration of that nature, and when you have done that, you will have reached the verdict which, if the plaintiff is to recover at all, he will be entitled to have in this suit

§ 433. A like charge by Mr. Justice Dixon.— GENTLEMEN OF THE JURY: This suit is brought in order to charge the defendant, with an accident that happened to the plaintiff on the 9th of January last, while he was engaged in working in their mill at Passaic. In order to find a verdict for the plaintiff, you must answer several questions which I am about to state to you in favor of the plaintiff. If you answer any one of those questions in favor of the defendant, your verdict will be for the defendant; if you answer them all in favor of the plaintiff, then your verdict will be for the plaintiff.

The first of those questions is: Did the accident happen to the plaintiff while he was engaged in doing work which he had been employed to do by the defendant or its authorized agents? That is the first question. It appears that he was employed directly by Mr. Scott, who called himself the foreman of the shop, to oil the journal boxes; and it was while he was oiling the journal boxes that this accident happened to him. Now, this question is, whether Mr. Scott was authorized by this defendant to employ somebody to oil the journal boxes. If you believe he was, and that he hired the plaintiff to do that work, then the plaintiff was engaged in the work which he was employed to do by the defendant. So, then, arises the second question: Was the accident caused by an unusually dangerous kind of oil? Of course, any person of the plaintiff's years must have known perfectly well that exposed iron or steel like those shafts would need to have some kind of oil upon them; and he also must have known that a revolving shaft meant danger; and when he undertook to oil those journal boxes the plaintiff knew the risk that he would take in coming close to the revolving shaft, which probably would be oiled with some kind of oil. Now, you cannot hold this company responsible for this accident unless the plaintiff has satisfied you that the oil which was used on this shafting was an unusually dangerous kind of oil.

The next question is: Was the oil put on the shaft under the authority of the defendant? By that I do not mean, was it put on by the direct order of the defendant corporation itself, but was it put there by some servant of the corporation who had control over that kind of matter — had the company furnished various sorts of oil, in this mill, under the direction of Mr. Bergstrom, the master mechanic, and was this among the

kinds of oil that the company had furnished for use by him around the machinery? It appears that he directed the use of this particular sort of oil. Now, if that oil was delivered in the mill to be used by Mr. Bergstrom in his discretion, then the oil was put there under the authority of the defendant. But if the oil was delivered there for some other specific purpose and not for that purpose, and he used it for that purpose, then it was his fault and not of the corporation itself. So, in order to answer this question in favor of the plaintiff, you must find that the oil was put there under the authority of the defendant, that is, by somebody who was authorized by the company to use the oil for that purpose in his discretion.

The next question is: Did the plaintiff know of the danger caused by the presence of this oil on that shaft? If he did know of it he took the risks of it, and cannot recover in this suit. In order that he may recover, you must find that he did not know of the danger attendant upon the presence of this oil on the shaft.

Next, if he did not know of that, then considering the age and experience of the plaintiff, could he, by the exercise of reasonable care, have learned of the danger caused by the presence of the oil on the shaft? You see, although he was only nineteen years of age, or thereabouts, yet he had some experience, was already a mechanic, and was chargeable with the exercise of such care as it was reasonable to expect of him; and if by the exercise of reasonable care on his part, considering his age and experience, he could learn of the danger caused by the oil on that shaft, then it would be just the same as if he actually knew of the danger caused by the presence of the oil there, and in that case he would not be entitled to recover. It would be one of the dangers, the risk of which he took as an employe.

The next question is: If the plaintiff did not know, and by the exercise of reasonable care would not have learned, did the defendant, or any of its employes, give the plaintiff such instructions or warnings as were reasonably calculated to inform the plaintiff of the danger of the presence of the oil on the shaft? That question springs out of the duty of those who employ minors — to those under age — in their employ, such instructions or warnings are as reasonably calculated to inform them of those dangers about their employment that are not

obvious to their age or inexperience or experience. And so here the fault charged upon the defendant, if any outside the mere use of oil, would lie in the failure to perform this duty, namely to give such instructions or warnings as were reasonably calculated to inform the plaintiff of the danger caused by the presence of the oil on the shaft. And in order to find a verdict for the defendant the jury must believe that if the plaintiff had been duly warned of the danger connected with the shafting it would have tended to prevent the plaintiff from being injured. You see if any warning that he might have received would not have tended to prevent the accident, why then the lack of giving such warning would have no effect in the case.

The next question is: Was the accident caused in part — or in whole, of course — by any lack of reasonable care of the plaintiff, either in respect to the scaffold he stood upon, or the clothes he wore, or the position he assumed in doing his work? The declaration in this case finds no fault with the defendant corporation in respect to the scaffold, and, therefore, you are to assume that the defendant furnished whatever was necessary in the way of scaffolding; and the only question in relation to the scaffold is whether the plaintiff ought not to have taken more care about the kind of scaffold which he would use in order to do his work. If you think he was blamable in having failed to exercise reasonable care with regard to the scaffold on which he mounted to oil those journal boxes, or if you think he failed to exercise reasonable care with regard to the clothing he was wearing, or if you think he failed to exercise reasonable care in the position which he assumed when doing the work, then the plaintiff cannot recover. In deciding this question you will bear in mind that the plaintiff was entitled to assume that the defendant had not caused anything to be done which would create any danger not obvious to him and not pointed out to him. In dealing with the question of the plaintiff's contributory negligence, you would regard him as being entitled to assume that the defendant had caused nothing to be done which would create any danger not obvious to him, and not pointed out to him. And in considering the question of the plaintiff's contributory negligence, the jury must take into consideration any danger in using the platform which was reasonably apparent to the plaintiff.

The jury must also take into consideration the question whether the plaintiff should not have added additional planks to make the platform safer. You will recollect that according to his evidence something slipped just previous to the accident. If you think there was a failure of reasonable care on his part in not adding additional planks, or if you think he did not use reasonable care in using the platform as it was, then he is not entitled to recover.

So you see all these questions must be answered by you in favor of the plaintiff before you can find a verdict for him. If you do answer all the questions in his favor, then you will give him such damages as will compensate him for his sufferings; for the inconvenience to which he has been subjected and to which he is likely to be subjected for the rest of his days; for the lack of earning capacity, for his disfigurement, and for all the expense caused by this accident and incident to his cure, which expense seems so far to be chargeable to himself and not to anyone else.

§ 434. **A like charge by Judge Wallace, of the United States Circuit Court.**—GENTLEMEN OF THE JURY: The plaintiff, while in the employ of the Lehigh Wilkesbarre Coal Company, on the 4th of April, 1887, while attempting to couple some cars, in some manner, exactly how may be in doubt, had his ankle crushed, receiving injuries that in a day or two resulted in the amputation of his foot, and he has brought this action to recover damages for the injuries thus received, alleging that they were caused by the negligence of the defendant, the Central Railroad Company of New Jersey. Now it is incumbent upon him to establish to your satisfaction that the injuries he received were caused by negligence which is imputable to this defendant, the railroad corporation. You will probably find, from the testimony in the case, that the tracks of the Central Railroad Company extended over the docks belonging to or in the possession of the coal company, and, in fact, such is the admission of the defendant, the railroad company, in its answer. It admits that it was operating a railroad among other places, "at the point or place where the plaintiff was injured." Assuming that this was its railroad, we find that the engine which was propelling the cars by which the plaintiff was injured was in charge of the engineer of the railroad

corporation. The railroad corporation at the time was operating its road by receivers, and the engineer was in the employ of the receivers. Therefore the evidence is sufficient to authorize you to find that if the plaintiff was injured by the negligent act of the engineer in charge of that train, he was injured by negligence for which this defendant is responsible.

The important and more difficult question is, whether the injury was caused by the negligence of the engineer. Now, negligence, according to the general definition, is a breach of duty. To observedue care, proper care, under the circumstances of the case. There cannot be any exact definition laid down to meet the facts of every particular case. What would be negligence under one state of circumstances would be proper care under another. The question in this case is, whether there was any breach of the duty to observe proper care on the part of the engineer under the circumstances. Now the plaintiff was engaged in a risky occupation. The duty of a brakeman is always one which entails more or less personal risk, but he is not to be subjected to any unnecessary risk because of the misconduct of others for whose acts he is not responsible. It has been said by counsel for the defendant, and very truly said, that in the operation of coupling cars it very seldom happens that one of the cars is not in motion, and I think we may start with the fact in this case, notwithstanding what may have been testified to, as pretty well established to the satisfaction of reasonable men, that when the plaintiff went in to couple these cars, one of the cars was in motion. Now, according to his testimony, it is customary for the engineer of the train in control of the moving cars to signal to the brakeman who is about to couple the cars, when to go in and couple. Obeying that signal the brakeman undertakes the duty, and when the cars are coupled he signals to the engineer and the engineer then proceeds. I charge you, as a matter of law in this case, that if, when the plaintiff was directed by the engineer to couple the cars and he proceeded to do so, the train had come to a standstill, and that without any indication that he had accomplished his work and before he had done so, the engine was started up without notice to him and he was run over under those circumstances, that you may find the defendant guilty of negligence.

Now, I think the principal question in this case is whether this train of cars was in motion at the time the plaintiff went in

to couple. What are the circumstances generally? It seems there was a train of twenty odd cars in front of the locomotive and being pushed by it, moving to the eastward. Ten of those cars had been detached in order to let out a car somewhere near the middle of the train, which was to be taken on a side track to the repair shop. Apparently the ten cars, the section of the train attached to the engine, was in motion all the time to the eastward. The ten cars detached had proceeded with some little velocity down the track and had gradually come either to a standstill or to a condition very nearly approximating to a standstill, and the other section of the train was approaching them. Now if the detached portion was standing still, it is apparent that the plaintiff might go between them and the approaching cars to couple them, staying in one place all the time, even though the other section of the train was under headway. That is the common way in which cars are coupled, as stated by counsel for defendant; but if both sections of this train were moving, if the detached section was moving, even though at a slow rate of speed, and the plaintiff then went between them, having to do the coupling, while at the same time he was walking along the track and accommodating himself to the motion of the cars, that, gentlemen, is a very different operation.

It is always a defense to actions of this kind, that the negligence of the plaintiff has contributed to the injury. In other words, if he has been negligent himself, he has no cause of action against the defendant, even though the defendant has also been negligent. And, therefore, the question whether both sections of the train were in motion at the time this injury took place, is a question of prime importance. If they were in motion, even though the plaintiff was directed by the engineer to go in and couple the cars, I instruct you, as a matter of law, that he was guilty of concurring negligence, and that he is not entitled to recover. On the other hand, if the detached section was still at the time, then I instruct you that he had a right to obey the signal of the engineer, and it was his duty under the circumstances to couple the cars, and I do not think you will find, as a matter of fact, that it was any negligence to do it, standing between the tracks. If both sections of the train, however, were in motion, then, as the witnesses all testify, the safer course for the plaintiff would have been to get on top of the car and do his coupling there. If he chose to take the chances

of going between, why he must take the consequences. Certainly the railroad company is not to be held responsible, under those circumstances. Now, what are the facts? Was the detached section of the train still or practically at a standstill at the time the plaintiff commenced to couple the cars together? Now, upon the one side you have his testimony distinct, unequivocal. On the other hand you have the testimony of two or three of the witnesses, one of whom is an employe of the defendant, and two of whom were employes of the corporation in whose employ the plaintiff was engaged at the time of the accident. Now this is a question of fact entirely for you. It is one in regard to which I should be unwilling to express an opinion of my own. I am frank to say there is some testimony on the part of the defendant which does not impress me favorably; but the last witness that was sworn here, Mr. O'Brien, the brakeman, impressed me as a man whose candor entitled him to confidence. He certainly had a good opportunity to observe what took place. He says that the detached section was under very slow speed. Of course I do not mean to say that the testimony of the other witnesses for the defendant is not entitled to respect. I leave this question of fact entirely for your decision without any comments upon it.

You will probably come to the conclusion that one of the two theories must be the correct one in this case, either that the engineer, in the hurry of business, started his engine before the proper time, assuming that the plaintiff had got the cars coupled and that everything was all right, or that the plaintiff himself, taking the chances that employes do, who get accustomed to the risks of their occupation, undertook to couple the two cars while both were in motion, in the way which was easiest for himself. Upon one theory the plaintiff is entitled to recover, upon the other he is not.

Now, gentlemen, as to the question of damages. If the plaintiff has established to your satisfaction that this injury occurred by the negligence of the defendant and without any negligence upon his part, then he is entitled to compensation for his pain and suffering, for his loss of time and for the impairment of his capacity hereafter to earn a livelihood. He is going through life a crippled man. To a certain extent the loss of his foot must unfavorably affect his capability for engaging in different employments, and he is entitled to be compensated for any possible

loss that may arise and for the general inconvenience that such a sacrifice always causes. It is for you to say, if you reach the question of damages, what sum of money will fairly compensate the plaintiff for his suffering and for his loss, past and the prospective.

The case has been very fairly tried, I am happy to say, on both sides. No improper considerations have been addressed to you. It is an unfortunate accident, but there has been no attempt to appeal to your sympathies, and very properly so. The plaintiff's misfortune is not to be visited upon the defendant because it happens to be a railroad corporation; but if he has been injured by the negligence of the defendant or the defendant's servant, then he is entitled to ample compensation for his loss.

The affirmative of the issue, as to the negligence of the defendant, is upon the plaintiff. It is incumbent upon him to satisfy you by a fair preponderance of evidence, that his theory of the transactions is the true one, and unless he has done so your verdict should be for the defendant. On the other hand, the burden of proof to show contributory negligence on the part of the plaintiff, is upon the defendant. And yet, as I have said before, I think you will conclude that the whole case revolves itself practically into the question, was this whole train in motion, both sections of it, when he undertook to couple the cars, or was the detached half of it still. If it was in motion and he could have done that work by getting on top of the car, instead of going between, then he should not recover. If it was not in motion, he was entirely justified, you will probably find, in going between the cars, and then certainly he should not have been subjected to this terrible misfortune by having the train improperly started. You may take the case.

§ 435. Charge by Mr. Justice Depue, of the Supreme Court of New Jersey, action by a servant.— At the close of the plaintiff's case I refused a motion to nonsuit, on the ground that there were aspects of this case which made it proper to put the defendant on its defense. The rules of law that apply to a motion for nonsuit are different from those that apply at the close of the case. A motion to nonsuit is to be denied whenever there be any evidence which would make it proper that the defendant should be put upon defense, and there are inferences of fact to

be deduced from any aspect of the evidence which would make it proper to have the case considered on its merits. A different rule applies to a case after it is completed and all the evidence is in, and the case is to be considered on the entire body of the evidence. There the case is to be decided, not on the question whether there is evidence in the case, but on the question as to where the weight of the evidence is. I make these observations for the purpose of distinguishing between the powers of the court on a motion to nonsuit and the functions of a jury after the case has been tried.

Now, gentlemen, this case is one that involves the application of rules of law which relate, not only to such an employment as the plaintiff was engaged in, but rules of law that regulate the relations of an employer and employe in every case and in every walk of life. In other words, there is nothing peculiar in this case arising out of the fact of the peculiar relations of the parties to this suit. The plaintiff entered the employment of the defendant. He engaged in an employment manifestly and obviously attendant with danger.

These are the rules of law which apply in every case where the relation of employer and employe exists. In the first place, the employe takes upon himself the ordinary risks of his employment. He also takes upon himself the risks that are incident to the negligence of a coemploye, and the responsibility of the employer arises only where, by reason of some latent defect, making the employment more than ordinarily hazardous, by the fault or neglect of the employer, a greater degree of danger is incurred by the employe than such as are the ordinary incidents of the employment in which he engages. These rules of law are of almost universal application and they govern, not only the relations between these parties, but they govern in every employment as between the employer and the employe.

Another principle is applicable, not peculiarly to this case, but to every case in which an action is brought to recover damages arising from negligence; and that is, that wherever it appears, as the result of the evidence, that the plaintiff himself was guilty of negligence, and that negligence contributed in any degree towards the production of the injury, he is remediless, on the ground that to a certain extent the injury is the product of the plaintiff's own fault.

I propose now to call your attention to the evidence in this

cause, and to indicate wherein circumstances may exist which may modify any of the general rules I have stated.

I will now discuss the first of the propositions I have mentioned, and that is the question whether, under the evidence, the injury sustained by the plaintiff was caused by the use of machinery creating a degree of hazard not ordinarily incident to the employment, and whether, under the evidence, there is any ground for laying the responsibility for that condition of affairs on this defendant.

At the outset the first inquiry in the case will be, under what circumstances the plaintiff was injured. That he was injured is undisputed. The question is, where the responsibility for that injury rests. The contention on the part of the plaintiff is, that by the use of a certain sort of coupling, more dangerous than those that were ordinarily used on this road, the plaintiff was subjected to an extraordinary hazard. In considering that proposition, the first inquiry is, between which two of the cars on the train the plaintiff received the injury. If it resulted from the effort to couple the two cars of the Delaware, Lackawanna and Western Railroad Company that were on the train, this case ends. If, under the undisputed evidence, and under the concessions made by the plaintiff's counsel — indeed, under the theory on which this case is maintainable at all — this injury arose from the coupling of the two cars of the Delaware, Lackawanna and Western Railroad Company, there is no ground to lay on the defendant responsibility for the consequences. The consideration of the rest of the case can only arise in the event of your finding, as a question of fact, under the evidence, that the injury did not result from the coupling of those cars, but from the coupling of one of those cars which had what has been called an open draw-head.

The undisputed proof is, that on the morning when this freight train went up the road it deposited on the switch at Wayne three cars. The undisputed evidence is, that of those three cars two were cars of the Delaware, Lackawanna and Western Railroad Company. The evidence is also undisputed that as those three cars stood on the switch, a car that belonged to the Erie Railroad Company was in the middle, the two cars of the Delaware, Lackawanna and Western Railroad Company being at each end. The evidence further shows that on the return of the train in the afternoon at Wayne, the train was broken in

two — one end of which, for convenience, I will call the caboose end, and the other the engine end. The evidence shows that the caboose end of the train was left on the main track; that the engineer ran forward the engine end of the train, dropped into the switch, drew out the tree cars, detached the rear car, which was a Delaware, Lackawanna and Western car, and sent it down towards the caboose end of the train. The evidence further shows that the engineer then ran forward with one of the Delaware, Lackawanna and Western cars, and the car belonging to the Erie company designed to be left at that station, and sent the Erie car down on the switch, returning to the train that remained on the main track with the one Lackawanna car sent down, and backed down to make his connections with the train.

The contention on the part of the plaintiff is, that this accident happened in the connection between the first of the Lackawanna cars that were sent down on the main track and the box car that remained on the caboose end of the train when the train was divided. It is insisted that this accident happened in making the connection between the Delaware, Lackawanna and Western car sent down the main track and the box car of the Erie Railway Company, which had this particular draw-head now in question. The contention on the part of the defense is, that this accident happened, not by the coming together of the cars of the Delaware, Lackawanna and Western that were sent down the main track, but that it was caused in the attempt to couple the two cars of the Delaware, Lackawanna and Western Railroad Company after the engineer had thrown on the switch the car that he proposed to leave at Wayne, after he had come out on the main line, and backed down in order to connect the train.

Now, you will perceive the importance of the evidence on this point at the very outset of this case. The contention on the part of the defendant is supported by the evidence of Mr. Conkling, the assistant conductor, by Westfall, the conductor, and by Drew, the engineer on the train. The contention on the part of the plaintiff is supported by his evidence alone. Mr. Shepard, who stood close by where this accident occurred, has no impression or recollection on that subject. Now, where is the weight of evidence in this case? The weight of evidence is not determined by counting witnesses on the one side or the other, but it is determined by considering the means of knowledge, the opportunities and the credit to be given to witnesses.

In order to confirm the testimony given by the defendant's three employes, Conkling, Westfall and Drew, there is produced before you evidence almost contemporaneous with the time when the accident occurred, and committed to writing at the time, so as to exclude the idea of forgetfulness. That evidence consists in the production of these telegrams, of these letters and these reports, all of which confirm the testimony on the part of the defendant with regard to the cars by means of which the accident happened, by referring to the numbers of the cars, which are the numbers of the cars of the Delaware, Lackawanna and Western Railroad Company.

In considering this evidence, gentlemen, you are also to regard the opportunity which these parties had to observe the actual condition of things at the time. Drew, the engineer, testifies that he did not see the plaintiff between any of the cars. He, therefore, did not see the occurrence at the time the accident took place; but he testified that when he sent down the car of the Delaware, Lackawanna and Western Railroad Company that was first sent down the track, he saw the plaintiff on the top of that car. He also testifies, and he is confirmed by the other evidence in the cause, that the car of the Delaware, Lackawanna and Western Railroad Company, that was first sent down the track, and which was coupled with the car with this open draw-head, coupled itself, and that immediately after the coupling and connecting of the train, when he returned from the switch with the one Delaware, Lackawanna and Western Railroad car, and the plaintiff was injured, the train immediately moved on. And he testifies (and his testimony in that respect is analogous to that of the other witnesses called by the defense) that when he reached the first station below Little Falls he then examined the bumpers of the two cars of the Delaware, Lackawanna and Western Railroad Company and saw the marks of blood on the bumpers.

The plaintiff, who certainly had opportunity to know, testifies that he took no part in the coupling of those two cars, and that the injury took place in the coupling of the first of the Delaware, Lackawanna and Western Railroad Company cars that was sent down the track to the caboose end of the train with the car that was next behind it.

Settle that question, under the evidence, for yourselves, according to the weight of evidence as it appears to your minds.

and to your consciences. If you find that the accident happened in the coupling of the two Delaware, Lackawanna and Western Railroad Company cars, then this case ends, for the reason that, under the undisputed evidence, the method of coupling on the Delaware, Lackawanna and Western Railroad Company cars is not only not extra hazardous, but is unusually safe.

Now, in the event of your finding that this accident happened, not in the coupling of the two Delaware, Lackawanna and Western Railroad cars, but in the coupling between the first of the Delaware, Lackawanna and Western cars that were sent down the track and the car in the rear, then other considerations arise in this case, and it is those considerations that will present the most difficult questions in the cause in the application of the rule that I have stated, as to the liability of the employe for all the hazards that are incident to his employment, and the responsibility of the employer only where, by reason of latent defects in the machinery, a greater hazard is laid upon the employe than would be apparent. The evidence is, that there are a number of methods of coupling cars. I think Mr. Baker said that almost every road had its own ideas with respect to the mode in which cars should be coupled. The contention on the part of the plaintiff is, that the car, in the coupling of which this accident happened, was one of this construction; that it had an open draw-head, as originally constructed; that in this draw-head, and also in the one in front, there is a clevis, and that the union is made by putting a bolt through the clevis and putting the cars together. The evidence further shows that as these cars are usually equipped, the space in the draw-head, from that point back to the spring, is ordinarily filled either with wood or iron. According to the evidence of Mr. Baker, if this space be filled, there is no way of forcing the link so far back that there would be any occasion for a person joining the cars to put his hand in that aperture. He testifies, also, that if the link of a car of this construction is driven back to reach the inner bolt, the connection should then be made with the link on the forward car, or that the person engaged in forming the connection should go to the caboose and get another link.

He also testified (and that is simply his opinion) that he didn't see how the link could get fastened in such a

way that there would be any need of an effort to detach it by inserting the hand in this place. He also testifies that this method of connecting cars is not as safe, of course, as the method employed by the Delaware, Lackawanna and Western Railroad Company, yet it is a method of connecting that at one time was in general use, and is not entirely disused at the present time. He does not say that exactly the same method of connecting is used on the Pennsylvania railroad, but he says that the same principle is used, as I understand him, except that, instead of having a link, it is a square construction. You understand it, probably, better than I do.

Now, gentlemen, the first question in the consideration of this case is, whether any responsibility would rest upon this defendant for using a method of connection that was not wholly disused on other roads, and yet a method of connecting which the jury, under the evidence, may think not to be so safe as that which is used on the cars of other companies. The law on that subject is entirely settled, and I read a single extract from an authority discussing this very subject in respect to injuries in coupling cars:

“This duty, as is well known, is highly dangerous, even under favorable conditions. It is, therefore, obvious that the rule of ordinary care, already stated, would place the company under a degree of care in providing its cars with safe apparatus for this purpose, which, applied to ordinary situations, would be denominated extraordinary. Yet, it is held, even here, that such a company is not liable for an injury received by a brakeman in coupling cars having double buffers, simply because a higher degree of care is necessary in using them than is demanded in the use of those differently constructed. Nor is such a company obliged to discard cars of an old pattern simply because it is more dangerous to couple them to cars of a new pattern than it is to couple new cars to each other. In all these cases care must be taken to note the distinction between a vice, common to a whole class of cars, with which the brakeman may be supposed to be familiar, and a vice peculiar to a particular class, such as a defective draw-bar, of which the brakeman may have no knowledge.”

This principle, gentlemen, has been adopted as the law of this State in the case that I alluded to in the course of the trial

of the case, where it was held that where a company used a method of arresting sparks which was in use with other companies, they could not be condemned for negligence, because, in the judgment of the jury, there might be other methods of arresting sparks which would be more efficacious. And in the application of this principle to the case now before the court, I should direct a verdict for the defendant, and should have granted the nonsuit that was applied for if the plaintiff had been an adult, because the character of the coupling that was used was such that, and the dangers incident to the use of it would be such that, a person accepting the employment would take the risks of them, and if he had been an adult there would have been no ground for the maintenance of this case. But, as you will see in the course of what I propose to say on this subject, the rule that I have stated with regard to the nonliability of an employer for dangers incident to the employment is modified to some extent by the age and experience of the person who is employed and who is injured.

The rule of law on that subject (and it arises frequently in this circuit, in connection with the use of dangerous machinery in other employments) is this (I read from the same authority that I have already referred to):

“The fact that the servant injured is not twenty-one years of age, or even a child of tender years, does not alter the rule which excuses the master from liability where an injury is caused by the negligence of a fellow servant. A minor who enters a particular service is deemed to assume the ordinary hazards incident to the service, such as risks of injury from open defects in machinery and appliances, the same as in adults. Thus, where a boy ten years of age was employed in a factory, and was injured by being caught in machinery, which it was plain should have been covered in such a manner as to have prevented the accident, it was held, that the question, whether at his age he had sufficient understanding of the hazards of the employment to bring him within the general rule, was a question of fact for the jury.”

And in laying down the duty of the master in that respect, the author says:

“The liberty which the law extends to any person of entering into a valid contract for service with a minor, would be greatly abused if it extended so far as to allow persons of ma-

ture years and experience to entrap children into hazardous occupations without being responsible for injuries resulting to them therein. Accordingly, the rule is modified so far as to put upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all. The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same situations as if he were an adult."

That rule has been recognized and applied by the Supreme Court of this State in a case that has recently been in the Supreme Court and is now in the Court of Errors and Appeals, having been taken up from the circuit, where a minor was employed in the running of a machine for the purpose of manufacturing wood pulp, and the application of this principle is to be found in an older case, although it is quite recent, *Beckham v. Hillier*, from which I will read an extract:

"A youth, sixteen years old, was employed to manage a cutting machine, in the running of which it was occasionally necessary to displace and replace the belt by which power was communicated from the revolving shaft to the machine. He had run such a machine for several months before and was told to be careful in replacing the belt, because there was danger of being caught in it, and was directed always to call some one to assist him in the operation, who might hold the belt in place on the machine while he stood behind the shaft and adjusted the belt upon the driving-wheel. The observance of this precaution materially lessened the risk. On one occasion, although assistance was within call, he attempted to replace the belt alone, without asking aid, and was caught in the belt and killed. In that case the court directed a nonsuit."

Now, these are the observations of the learned judge:

"Although the plaintiff's intestate was still a minor, he had attained years of discretion when he became chargeable with the exercise of due care. Such care, indeed, is not that required of persons of full age, but is to be ascertained with reasonable regard to the ordinary conditions attendant upon his years. When, however, the standard of due care has been thus determined,

the rule which makes contributory negligence in the party injured a defense against an action for damages arising from the defendant's want of care, applies to the minor as well as to others. Minor servants also are held to assume, by their contract of employment, those ordinary risks of their services which are obvious to them or have been pointed out in a manner suited to the comprehension of their youth and inexperience. They cannot ignore the dictates of common prudence of the instructions of their superiors to guard themselves from these apparent dangers and charge the consequences upon their employers."

You will perceive, from the extracts I have read, that, on this part of the case, the material consideration for the jury will be whether the plaintiff, under the circumstances, with the experience that he had and with the instructions given, had been placed in such a position that the rule in regard to the assumption by the employe of the dangers incident to his employment should apply as if he were an adult.

The proof is, that the plaintiff, at the time this accident happened, was a little over eighteen years of age; that before he entered into the defendant's employment, he was a newsboy, and that he was employed as an extra brakeman in the July preceding the accident, which took place on the 16th of November. The evidence on the part of the defendant is (and it is denied by the plaintiff), that he was given instructions and directions by persons connected with the running of that train which pointed out to him the manner in which the work he had engaged to do was to be performed, the evidence being that he was employed as an extra brakeman and ran about for days in each week. Now you have, for the purpose of solving this proposition, the prior employment of the plaintiff, his age, the length of time he was employed, the experience he had and such instructions as, under your finding of the evidence, he received from the defendant's employes. You saw the plaintiff himself on the stand, and from these methods of forming a judgment on the subject you are to decide whether there is, under the evidence, that which will take the plaintiff's case out of the application of the general rule applicable to adults. If you find that there was such information as complies with the obligation that rests upon an employer where a minor is employed, and that, under the circumstances, the plaintiff was on a level with an adult, this case must end, for the responsibility being

the responsibility of an adult no liability would be laid on the employer.

If you find that issue in favor of the plaintiff and that the duty of the employer had not been discharged with regard to the dangers of this employment, two other questions will arise. I have said, in the statement of the propositions that are involved in this case, that where there is negligence on the part of the defendant, yet if there be contributory negligence on the part of the plaintiff, the plaintiff himself cannot recover; and I have stated that that principle of law is applicable, not peculiarly to this case, but to every case in which an action is brought to recover damages for the negligence of the defendant. In the first place, it is contended, on the part of the defendant, that contributory negligence, in a general sense, appears from the evidence, and the contention on the part of the defendant is, that that negligence consisted in the fact that, with this train known to be coming down, the plaintiff stood with his back to the engine end of the train for some time in his effort to adjust this link. Now, I refused, at the close of the plaintiff's case, to consider that as a ground of nonsuit, for the reason that it appeared from the evidence that before the plaintiff went in that position of danger he took the precaution to see that the train was brought to a standstill, and I said then, and I repeat now, that under those circumstances the evidence of contributory negligence would not be such as would authorize the court to withdraw the case from the jury, because it might be assumed that the plaintiff relied on the engineer remaining at that place until a new signal was given. But the evidence on this subject is controverted on the part of the defense, and it is insisted that the train was not brought to a dead stop; that, on the contrary, while the plaintiff was in that position, although the train that was being backed down had slowed, it had not come to a dead stop. If you adopt that view of the case, the plaintiff was guilty of contributory negligence; because to place himself in that position, with this obvious danger approaching, was not the exercise of that degree of care which the law exacts of persons. On that subject you have, in the first place, the testimony of the engineer, and also the testimony of Shepard, who says that the train slowed down as if it was going to stop; and, on the other hand, you have the testimony of the plaintiff, that before he ventured in that posi-

tion he saw this train stop. Settle that question also on the weight of evidence for yourselves. If you find that he took the precaution to have this train stop, then there was no contributory negligence. If, on the other hand, he ventured in that position with the train moving down, without the precaution of seeing that it was brought to a stop, then there was such contributory negligence as would debar him from maintaining this action.

This evidence of negligence, as invoked, and legitimately invoked, has another force in this case, in its application to a rule distinct from that which I have now considered. In speaking of the rules of law applicable to cases of this kind, I have said that the employe takes upon himself the risks incident to the negligence of his co-employes, and, as I read from this book, that that rule applies as well to a minor as to other persons. If you find, as a result of the evidence, although you may find all the other propositions in favor of the plaintiff, that this injury was the result, not of the fault of the company, but of the negligence of the other employes on the train, then the responsibility for the injury is not cast upon the employer. It is one of the risks incident to the employment which, as I have said, every employe assumes. And that question arises in this wise. I have already said that the plaintiff testifies that he thought the train was brought to a dead stop. It also appears from the evidence (and that is the contention on the part of the plaintiff) that the engineer, in violation of his duty, without receiving any signal, moved his train down upon the plaintiff when he was in this position of danger. If you adopt that view of this case, then it is manifest that this injury was the fault of the engineer; it was the negligence of a co-employe; and if the case had presented that and no other issues at the close of the plaintiff's case, I should have nonsuited him on that ground. But it also appears, as the result of the evidence on the part of the plaintiff, that Clark, who was the head brakeman, and who, on a train, occupies somewhat of an advanced position in the way of the drilling of the cars, was on the top of the car that was sent down on the switch. I assume that it might turn out from the evidence that he had given the signals, and that, although the plaintiff may have given the signals, yet that the engineer had acted under the signals given by the brakeman whose duty it was to give the signals for the backing of the train at that time.

The proof is that Shepard, who stood close by the two cars that were joined, gave no signals. He says that the reason he gave none was, that he expected Clark to give the signals. The engineer testified that he received the signal from Shepard, and he indicated that it was a signal simply to slow down. Shepard saw the man there; he was in there for some minutes; and if you adopt that view of the evidence, then this accident was the result of the negligence of Shepard, the co-employee of the plaintiff, within the rule I have stated.

Now, gentlemen, if, on a consideration of the questions that are raised in this case, you find the several issues necessary to maintain this action on the part of the plaintiff in his favor, then the next question will be damages, and on that subject the law provides no rule. He has lost his hand. He is eighteen or nineteen years old, and whatever you would think to be fair, reasonable, not excessive, compensation for such an injury, would be the amount of damages to be awarded in this case.

Now, with a brief statement of the legal issues, I leave the question to your consideration. First, is there evidence in this case with regard to the inexperience, absence of information, absence of instruction, such as would take this case out of the rule that is applicable to an adult? That is the first question. If you find that this accident happened in the coupling of a car with an open draw-head. If you find that question in favor of the plaintiff and find that there was fault, in that respect, on the part of the defendant, the next question will be as to whether the doctrine of contributory negligence, in the general sense I have mentioned, applies to this case. If you find that it does not, the third proposition arises, and that is, whether this accident was the result of the negligence of a co-employee. And if you find, from the evidence, that this accident occurred in the coupling of a car with an open draw-head and that the youth, inexperience and absence of instruction on the part of the plaintiff takes this case out of the general rule I have stated, and find that with the information, experience and instruction, if any, that he got, he could not by the exercise of ordinary care have avoided the accident, and that it was not the product of the negligence of a co-employee, you should find a verdict for the plaintiff, with an assessment of damages on the basis I have mentioned.

§ 436. Charge by Mr. Chief Justice Magie, of the Supreme Court of New Jersey, action for an accident at a grade crossing.— On the 11th day of January, 1893, at the Vosseller avenue crossing of the defendant's railroad, the plaintiff's horse was struck by a locomotive running easterly on the south track, towards which the plaintiff was approaching, travelling north; the collision killed the horse, injured plaintiff's harness and sleigh and injured himself. On this point there is no contradiction in the case; but these facts, gentlemen, do not of themselves establish plaintiff's right to recover damages for his injuries; he must further establish, and that by a preponderance of proof, that the collision which did him the injury occurred by the fault or neglect of the defendant. The evidence must convince you that the defendant was in fault or failed in the performance of some duty which was incumbent upon it.

Railroads are created to carry passengers and freight, and that by trains run at speed; where they cross public highways along which the public have the right to travel, the necessity for maintaining their speed, the entire inability to stop at every crossing to permit passengers to cross, gives to every railroad a right of way as against the public passing on the highway. But, of course, the railroads are bound to take reasonable care and precaution for the safety of such passers on the highway by giving notice of the approach of their trains. The legislature has defined and limited the liability of railroads in respect to audible signals, that is, signals given by sound; it declares that they may perform this duty which they owe to the public in respect to audible signals by giving a whistle commencing 300 yards from the crossing and continuing it until the crossing is reached, or by ringing a bell 300 yards from the crossing and continuing it until the crossing is reached. They are not bound to do both; they may do either one, and if they do either one, then, gentlemen, they perform their statutory duty, the duty in that respect which the statute imposes upon them.

Now, it is said here that there is no proof that this bell weighed the amount that the statute required, nor that the whistle could be heard at the distance that the statute mentions. On the latter point there seems to be evidence that this whistle was heard above the iron bridge, at the crossing, a distance which, I think, some witness gave, and which I do not remember precisely; but, in all events, the burden is upon the plaintiff to

show that the statutory signals were not given, and where the burden is sought to be carried by simple proof that the bell was not rung or the whistle blown, I have held in this circuit before and hold again that the defendant is not bound to prove that the bell had the weight; it will be presumed that the statutory requirement in that respect was performed.

This raises the first question: Was the statutory signal given? As I have just said, the burden is on the plaintiff — he must prove it. On this point, of course, the evidence is negative; that is, it is the evidence of people who say they did not hear it. The plaintiff, himself, says so; he says he did not hear it, but you must remember the circumstances under which he approached that crossing: A coal train was passing and the caboose of it just cleared the crossing as he came towards it; as I understand his evidence (and you must correct me if I am wrong), he had bells upon his sleigh; there was somewhere along there a bare spot over which he passed. Now, if all these tended to interfere with his hearing, of course, it would affect the weight to be given to his evidence, and you will recollect what was said by the others as to whether or not they were attentive. From anybody that was really watching to see if the signal was given, negative evidence is very strong; but when no attention is being paid, it will be for you to say whether negative evidence will have weight, and what weight it will have.

On the part of the defendant the evidence is positive. The engineer says he rang the bell because the fireman was in the tank coaling the engine. The fireman says the engineer was ringing the bell, because he heard it, and he asserts that he remembers it because it would have been his duty to ring the bell by a bell cord that came to the tank if the engineer was not ringing it; and he didn't ring it, and therefore, he says, he remembers the engineer was ringing it. So the switchman at a distance spoke about the signal by the whistle, but evidently that signal was not continuous; the continuous signal, if any was given, in this case, was the signal of the bell. Now, of course, if this is proved not to have been given, then, gentlemen, the defendant is in fault; if proved to have been given, then defendant is not in fault in that respect, but when, by the mode in which the railroad is constructed, a situation of unusual peril and danger to travellers on the highway is created and the statutory signals are not reasonable precaution against injury to such

travellers, then I charge you, that the railroad is bound to take such additional precautions as are reasonable to avert peril from travellers on the highway; and this introduces the second question in this case: Was this place so constructed as to create a situation of unusual peril to those who were using the highway in crossing that railroad track, and did it make the statutory signals not reasonable precautions against the danger? You will observe what the construction was: the railroad was below the bank on the Fisher property; the highway from the Main street down to the railroad, in order to cross at grade, obviously had to descend; there was, therefore, a descent; that left on the left, or west side, a bank. Now, what you are to look at is the bank as it was then; if there is any difference now, you are to consider it not as it is now, but as it was then; and, of course, one of the first questions you will ask yourselves is, whether it has been changed? The plaintiff says it has; Mr. Colter, a witness called by him, says that it has been only in this respect — that some bushes which grew outside of the fence along the Fisher line have been taken away. He did not know of any ground or dirt being taken from the slope of the bank; that is what the plaintiff says he saw — dirt taken from that slope. Abbott, the supervisor of the railroad, in general charge, declares that nobody for the railroad company would have taken away dirt there except by his order, and that no such order had been given by him. Of course, if the bank is different now than it was then, observations made now would not afford any aid to us in determining the situation as it was then, but if the bank is practically as it was, why, then, they would be very strong indications of what the situation was then. Now, if you believe the bank is practically now as it was then, the evidence of those who have measured — and there is no contradiction of this — is that the bottom of the slope of the bank is eight feet from the south rail; the top of it is twenty-one feet from the south rail, and it sloped from twenty-one feet down to this point, eight feet away. The bank was seven feet two inches high above the south rail at the crossing; it was a little higher as you went west, but the bottom of the slope was the same distance from the south rail; then, at a distance, north, at the next crossing, I think it was, it came about on a level, or, perhaps, a little below the railroad. Now, there was a slope then in a distance of the difference between eight feet and

twenty-one feet — thirteen feet — from the height of seven feet two inches down, or from a little additional height 100 feet further west. Undoubtedly, this was an obstruction; it was an obstruction that stood in the way of anybody approaching that crossing seeing towards the west; but it is not sufficient to charge this defendant with the duty of taking extra precaution merely that there was an obstacle there; it must be such an obstacle that does not permit a man using reasonable care for his safety to observe the statutory signals, or to look and see approaching trains, if he reasonably could look. If the obstacle did interfere with the reasonable use of the senses of sight and hearing of a man approaching that crossing, it will be for you to say whether it did not call for additional precautions, such as were reasonable to give notice of the peril, and such precaution to be taken by the railroad company.

As the avenue is now, those who have observed and made measurements declare that, at eighteen and a half feet south of the south rail, one standing and another at another time observing, seated in a sleigh, could see 1,134 feet west up the track, a little over a fifth of a mile. At seventeen and a half feet the observers declare you can see over 2,500 feet; at twenty-eight and a half feet you can see 100 feet. The bank, as I said, was seven feet two inches high at the crossing, and, of course, sloped down for the width of thirteen feet, and the engine, which was in this collision, had a smokestack fourteen feet two inches high above the rail, a cab twelve feet ten inches high, and a dome fourteen feet five inches high.

Now, gentlemen, if the construction of the railroad presented an unusual peril to travellers and the ordinary statutory signals were thereby not reasonably sufficient to give notice of the peril of an approaching train, then the defendant did not perform its duty, because it gave no other signal; but, if the defendant is in fault in either of these respects, that is, either if it did not give the statutory signal, or if other signals were required, and it did not give them, it does not necessarily follow that the plaintiff is entitled to your verdict. There is another question which you will have to determine before the plaintiff will be entitled to a verdict, because, if the plaintiff, by his own negligence, contributed to his injury, he cannot recover, even though you believe the railroad company was guilty of negligence.

If the plaintiff was derelict in his duty and that dereliction was a contributing cause to the collision it is my duty to say to you that the plaintiff is not entitled to your verdict. What was his duty? It was to take such reasonable care for his own safety as a man of reasonable prudence would do under the circumstances; if this crossing was particularly dangerous, the plaintiff was bound to take such precaution as the peculiar danger required. The plaintiff did know this crossing, and he did know it was dangerous; now, did he take reasonable care — did he perform his duty? His duty was to look and to listen for an approaching train. No man can approach the crossing of a railroad along which trains are run at great speed, and perform his duty to himself or to the community, without looking and listening for an approaching train, and if he fails in the performance of that duty, and is injured, he cannot recover.

His duty is to listen, not casually, but with intention, for the purpose of hearing, if it is possible to hear. If the plaintiff was making himself, by his movements, a noise which tended to prevent his hearing, it was his duty, I charge you, to stop that noise so that he could hear; or, if the noise which he made in connection with the noise of the train which was then passing — the coal train — tended to prevent his hearing, then I charge you that it was his duty to stop his noise, so that he might have an opportunity to hear. If the plaintiff did not listen, in the sense in which I have described, he did not perform his duty, and if he, by failing to listen, went on, and the collision occurred, he cannot recover; but if there was no noise being made by him which tended to prevent his hearing, or which operated to prevent his hearing, then, gentlemen, he was not bound to stop, if he could hear just as well while moving, and he would perform the duty of listening, doing it when he was moving along.

Now, the duty, I have said, is to look. I repeat, it is not merely to cast a casual glance; it is to look with attention, so that you may perceive if there is a train approaching; you are bound to look, so that you may discover if a train is coming, and you are to look both ways; and you must take reasonable care to look when your looking is reasonable, that is, to look when you can see, and it is to be done in the way that a man reasonably careful for his own safety would do; that is the duty that is to be done — to do what a reasonable man would

do under the circumstances; and I repeat again, if the plaintiff did not perform this duty he cannot recover, but if he did look, as a reasonably prudent man would under the circumstances, then he performed his duty.

Something has been said with respect to the gates at the next crossing. Obviously he could not permit himself to rely on those gates, whether they were up or down; he was still bound to look or listen, for those gates were made for the other crossing, and the fact they were up or down would have been a circumstance he could take into consideration, but which would not control his conduct and make that reasonable which otherwise would have been unreasonable.

Of course, gentlemen, if the plaintiff is entitled to recover, he is entitled to recover damages. Damages in these cases mean compensation, nothing more — compensation. He is entitled to recover the market value of the horse which was killed — the market value would be what the horse would have brought in the market — and the diminution in the value of the sleigh or harness. Then, for himself, his doctor's bill; then for the pain and suffering, for the loss of his work from the time he was injured until the present. But, gentlemen, this is the only action the plaintiff can ever bring; therefore, whatever he gets by way of compensation must now be calculated by you — a difficult calculation to make, but one which you must make. He is entitled to damages for any injury which will be the probable result, looking at the facts as we have them, in the future from this collision. The probability of future pain and suffering may be taken into consideration by you — the probability of inability to work, or the diminished ability to work. He is thirty-four years old; he has a trade, a carpenter and wheelwright; he says he got for that work \$2.25 a day. Of course, gentlemen, when you take that into consideration, you must remember that there are days when there would not have been work — there are days when men are sick; when men get older they can't work so much, and when they get quite old they can't work at all. All these things are to be taken into consideration, and, of course, you are not to give a sum which at interest would bring in what this man would get by his work, because, then, when he died, the sum would be left. You must give, if you look at the question in this way, the present worth of what he would get in the future, so that using it from year to year it would all be used up at the date of his probable death.

Now, gentlemen, if the defendant is proved in fault and the plaintiff does not appear to be in fault, your verdict should be for the plaintiff; but if the defendant is not proved in fault, and if the plaintiff be in fault in the way I have stated, then your verdict should be for the defendant.

Are there any questions of fact that counsel think I have made an error on? Questions of law you may deal with afterwards.

§ 437. Charge by Judge Child, of the Circuit Court of New Jersey, action brought by husband and wife, for an injury to the wife.—GENTLEMEN OF THE JURY: This action is brought by Sarah A. Perret and Andrew Perret, her husband, against the Delaware, Lackawanna and Western Railroad Company, to recover compensation for an injury which the plaintiffs allege resulted to them in consequence of negligence on the part of the defendant company.

From the evidence in the case it appears that the relation existing between these parties on the night of November 29, 1894, was that of carrier and passenger, and, therefore, all the duties and all the obligations due from the defendant to a passenger were due from the defendant company to the plaintiffs in this case.

The evidence establishes the fact that the plaintiffs left Hoboken at quarter-past 10 on the night of November 29, 1894. Roseville station was reached, according to the testimony, at about 10:37; if the train had been on time it would have reached the Roseville station at 10:37. When the Roseville station was reached, the plaintiffs were notified in the usual manner that their destination had been reached; that notice also informed them that the contract of carriage theretofore subsisting between the defendant company and the plaintiffs had been performed, so far as transportation was concerned; and thereupon it became the duty of the plaintiffs to vacate the car when so notified.

The train the plaintiffs were riding upon was called the Montclair train. Until Roseville is reached, or until within a short distance of the Roseville station, trains going to Montclair follow the line of the old Morris and Essex railroad until the Roseville avenue station is reached, when they branch off, and thence, from that point, run over the Bloomfield division.

When this train was stopped, it was not stopped on the main line of the Morris and Essex railroad; it was not stopped, as I understand it, at the railroad station; but it was stopped at a portion of the Bloomfield branch. The train having been stopped at that point, and the plaintiffs having been notified that the contract with reference to transportation had been performed, and the train having come to a full stop, the plaintiffs attempted the exit. The husband going first, stepped from the step of the car to the ground, and then he discovered, according to his testimony, that owing to the height or distance from the step to the ground, it was dangerous, and that he turned around with the intention of notifying his wife of that fact, but when he turned around he discovered that she, accepting the invitation of a brakeman, had attempted to alight, and was then actually descending from the step to the ground; that when she reached the ground she placed her hand upon the arm or shoulder of her husband, and informed him that she had received a bodily injury while alighting — that she had been hurt. The testimony of the husband with reference to the height of the step from the ground, or the distance between the step and the ground, is that it was some twenty-six inches, and that the place where the plaintiff had to alight, acting upon this invitation extended to her, was not at a platform, but upon the ground between the tracks of the defendant company.

The further testimony in the case is that this night was a clear night. I do not think there is any evidence as to the moon shining — as to whether the moon was shining or not. You will recollect it, if there is. But the only evidence with reference to artificial light is that there was a station light. Of what benefit that was to a person attempting to leave the cars, you can, perhaps, gather from the evidence.

Now, as I have stated, in this case the plaintiff insists that she received this injury for which compensation is sought, while she was alighting, or in the attempt to alight from or leave this car, and in this case damages are sought to be recovered as compensation for that injury. The burden of showing to your satisfaction, by a fair preponderance of the evidence, negligence on the part of the defendant, and the further fact that that negligence was the proximate cause of the injury complained of, is imposed by law upon the plaintiffs; and before the plaintiffs can recover, the evidence must satisfy you that the defend-

ant company failed to perform its duty towards the plaintiff, Sarah A. Perret, and that by reason of such failure in the performance of such duty, the injury she complains of was received or sustained.

The plaintiffs insist that the company failed to perform its duty, because the plaintiff, Mrs. Perret, was notified — invited to alight at a place unsafe and dangerous in consequence of latent dangers, dangers known to the defendant, but unknown to the plaintiff, and which she could not discover by the exercise of reasonable care. The allegation is, that she was invited to alight at an unsafe place — unsafe to the knowledge of the defendant company. In considering this question — as to whether or no the place was dangerous — you must consider all the circumstances in the case; the alleged height of the step from the ground, the place where the plaintiff would be compelled to alight after she had left the step, the condition with reference to the light being insufficient to apprise the plaintiff of the conditions under which the act had to be performed.

Now, gentlemen of the jury, the defendant company, as are all common carriers, is charged with a duty, and that duty is to exercise reasonable care to secure the safety of passengers, not only while upon the train, being transported from point to point, but also to exercise reasonable care to afford to the public a safe means of exit from its cars. Reasonable care is the care which a reasonably prudent man would feel called upon to exercise under the given circumstances. And when we speak of a corporation exercising reasonable care, we do not refer to the invisible corporation, but to the persons managing and controlling the affairs of the corporation. So, you see, the allegation is, then, that the persons in charge of this car did not exercise reasonable care to afford to the plaintiff a safe means of exit from the car.

As I have stated to you, the duty imposed on the defendant company to use reasonable care, was to use reasonable care to afford to the plaintiff a safe means of exit from the car under the existing circumstances, and if dangers — latent dangers — did exist with reference to the exit, either owing to the height of the step from the ground, or because of the place where the plaintiff would be compelled to alight after she had left the step, or from the failure to provide a platform, thereby lessen-

ing or decreasing the distance between the step and the place where she would alight — if latent dangers did exist with reference to the exit, then I charge you, it was the duty of the defendant company, in the exercise of reasonable care, to warn the plaintiff of the existence of those latent dangers, so that she might be enabled by the exercise of reasonable care on her part to avoid injury therefrom.

So, gentlemen, you will see, the first question for you to decide in this case is, was there a necessity for warning? Did latent dangers exist with reference to the place selected by the defendant company for the discharge of its passengers at that point? If such latent dangers did exist whereby the ordinary risks incident to an exit from a car were increased, I charge you, the duty to warn was imposed by law on the defendant company, and the failure to so warn is evidence of negligence.

Then, another question to be considered by you in this connection is this: If you find the conduct of the defendant company was negligent, then the question is, was the negligence of the defendant company the proximate cause of the injury the plaintiff, Mrs. Perret, complains of? Did she receive her injury because of negligent conduct on the part of the defendant? If she did not, if the evidence does not satisfy you that the injury was so received, your verdict must be for the defendant company.

Now, on that point you have the evidence of the plaintiff, Mrs. Perret, and the evidence of her husband. The evidence of the plaintiff, Sarah A. Perret, is, that prior to this event happening, she had been in the enjoyment of good health; that she was in the enjoyment of good health when she started to leave the car; that instantly after stepping from the car she experienced a pain which has continued with varying degrees from that time down to the present; and that she at that time spoke to her husband and said that she had been so injured. Does that evidence satisfy you that the plaintiff, Sarah A. Perret, did come by her injuries in consequence of the accident that happened to her on that occasion?

If you are satisfied of negligence on the part of the defendant — that is, failure to perform its duty to exercise reasonable care, to furnish to the plaintiffs a reasonably safe exit from the car — and you are satisfied that failure to perform such duty was the proximate cause of the injury complained of, then the

plaintiff, Sarah A. Perret, has established a case where she will be entitled to your verdict. And if the plaintiff, Sarah A. Perret, is entitled to your verdict, then her husband will also be entitled to your verdict.

I do not understand that it is contended in this case that the plaintiffs contributed, in any way, by their negligence to the happening of this accident, nor do I understand that there is any evidence in the case tending to show negligence on the part of the plaintiffs. The issue, then, is a simple one; it is a simple question of fact for your determination. Does the evidence show you — satisfy you — that the defendant company failed to perform the duty I have referred to, with reference to the exercise of reasonable care, to afford to the plaintiffs a safe means of exit from its cars? If it does (the burden being upon the plaintiffs), and if you are satisfied from the evidence that that negligence was the proximate cause of the injury complained of, then the plaintiffs are entitled to your verdict. And if the plaintiffs are entitled to your verdict, they will be entitled to recover damages by way of compensation — not vindictive damages, not damages for the purpose of punishing the defendant — but compensatory damages, such damages as will compensate the plaintiffs for the injury the evidence shows resulted to them in consequence of the wrongful act of the defendant company, if it was a wrongful act.

In this case it will be necessary for you to render two verdicts, if you find in favor of the plaintiffs: a verdict in the case of Sarah A. Perret, and also in the case of Andrew Perret. If entitled to recover, Andrew Perret will be entitled to recover such a sum as will compensate him for the loss of services of his wife, and the loss of her society, resulting from this accident; and if the accident has made necessary the expenditure of any money in effecting a cure of his wife, he will be entitled to compensation for that; and if her physical condition, resulting from this accident, is such that it will necessitate the expenditure of money in the future, he will be entitled to compensation for that. The plaintiff, Sarah A. Perret, if you are satisfied of the right of the plaintiffs to recover, will be entitled to compensation for the pain and suffering and inconvenience resulting to her in consequence of this injury.

As I have had occasion to remark many times this term, gentlemen, and often, I presume, in your hearing, there is no

rule — there is no measure by which pain and suffering can be compensated for; it must always be left to the sound discretion and conservative action of a jury. Consider the circumstances attending the injury; consider the length of time the plaintiff was incapacitated, the length of time during which she has suffered pain, the severity of the pain, the inconvenience resulting in consequence of the accident; and award her for pain and suffering such a sum as you honestly believe will compensate her. That is all I can say. I leave it to you. She is entitled to compensation, if she is entitled to your verdict, and she is entitled only to compensation. And in considering the case you will recall the evidence of the physicians and the evidence of the plaintiff, the length of time she was confined to the house and the length of time she was confined to her bed; and if you are satisfied from the evidence that the pain, suffering and inconvenience still continues and will continue in the future, she will be entitled to compensation for that.

I don't think I have misstated any question of fact.

I decline to charge except as I have charged.

§ 438. Charge by Mr. Justice Dixon, of the Supreme Court of New Jersey, action for injuries sustained by a collision of a locomotive with an electric car.—GENTLEMEN OF THE JURY: You will recollect that you are trying two suits, one brought by the receivers of the New York, Lake Erie and Western Railroad Company, and the other brought by the New York and Greenwood Lake Railway Company, both claiming to recover against the defendants for the damage they sustained by reason of an accident at the Singac crossing of the Greenwood Lake railway in September of last year. The principles involved in suits of this character have been frequently stated this term, in the hearing, probably, of every one of you gentlemen before this. They are not novel principles at all; you are already familiar with them. Stating them generally, they are these, that the burden rests on the plaintiffs in each case to prove that the accident resulted from the negligence of the defendants, or from the negligence of persons for whose conduct the defendants were responsible. If the plaintiffs prove that, then the plaintiffs recover, unless the evidence also shows that the negligence of the plaintiffs, or the persons for whose conduct the plaintiffs were responsible, helped to cause the accident; and if the evi-

dence shows that latter negligence, then the plaintiffs cannot recover.

In this case, the first question, then, for consideration is, whether it appears that this collision between the train of the Greenwood Lake Company and the car of the defendants was caused by the negligence of the persons in charge of the electric car. Now, you have in your minds, or if you have not, recall to your minds as well as you can the particular circumstances under which the persons in charge of this electric car were placed immediately before the accident. You will remember the evidence shows that there is on the track of the electric railway company, about fifty feet away from the rails of the steam railroad, what is called a derailing switch. If the car passes that switch while it is in its usual condition the car runs off the track. Consequently, in order that the car may pass safely along the track that switch must be closed, and in order to close it one of the persons in charge of the car is required to go forward, cross the Greenwood Lake track, and there, by raising the lever, close the switch. When that is done, then the motorman can move the car along the track and so cross over the Greenwood Lake railway. Now, that is the thing which the persons in charge of the car on that day attempted to do. The conductor, at a point about fifty feet away from the Greenwood Lake track, left the car, walked forward across the Greenwood Lake track, and just across the further rail stooped and raised the lever; when he did that, the motorman brought the car past the switch and up to the Greenwood Lake track, and was there struck by the locomotive. Now, the question for you to say is whether, under those circumstances, those two men — the conductor and the motorman — were so negligent, or whether either of them was so negligent, that the accident sprung out of such negligence. The general rule is that any person approaching and about to cross a steam railroad track must use his eyes and ears, and he must look and listen, and he must look and listen attentively for the approach of a railroad train. He is bound to know that he is approaching a railroad track. Both of those men did know it, of course, and they were bound to look and listen attentively for the purpose of informing themselves if a train was coming, and if they then were apprised that a train was approaching, they were required to take no risks, but were required to wait until the train had

passed. Now, did this conductor and this motorman perform that duty? Did they look and listen attentively in the exercise of reasonable care under the circumstances, for the purpose of apprising themselves whether a train was approaching or not? If they did, and failed to see or hear the train, then they are not responsible for the consequences. If they did not, then they are responsible; or if they looked and listened, and heard or saw the train coming, then they are responsible for the consequences, because they attempted to cross when the train was coming. Of course, in determining whether in fact they saw or heard that train, the speed of the train is of some consequence, because that would determine its distance from the point of collision at the various stages of the progress of those men. According to the evidence, the train was coming, the engineer says, at the rate of from twenty-five to thirty-five miles per hour. The conductor, if I remember right, said the speed at which the train was travelling was somewhere between thirty-five and forty-five miles per hour. Now, gentlemen, twenty-five to forty-five miles per hour does not give us a very definite notion of speed, unless we proceed to a calculation; and, therefore, let me draw your attention to this simple rule, that a mile an hour means about a foot and a half in a second, so that forty miles an hour would mean about sixty feet in a second, and twenty-five miles an hour would mean about thirty-seven feet in a second. That simple rule will enable you to appreciate more closely just what the rate of speed of this train was at that time. According to the evidence, you will remember that this train was visible from the crossing for a distance of something like 2,200 or 2,300 feet. If that train was coming at the rate of thirty-seven feet in a second, it would cover that distance in about a minute, or sixty seconds; if it was coming at the rate of forty miles an hour, it would cover that distance in about forty seconds. Now, to appreciate how long a time forty seconds is, and how long a minute is in your jury-room, just take out your watches and see how long those times are, and then you are to determine how long the train was actually visible from the crossing, and whether those men did their duty or were negligent of their duty, that duty being to look and listen attentively for the purpose of seeing or hearing whether a train was coming.

Now, I say, if you come to the conclusion that neither of

those men was negligent, or that the accident did not result from any negligence of either of those men, that ends your consideration of the case, and you will find your verdict for the defendant in both cases. But if you come to the conclusion that the negligence of either the motorman or the conductor of the electric car caused this accident, then you ask yourselves the further question, "Does the evidence satisfy you that negligence on the part of the persons in charge of the train helped to cause the accident?"

Now, the duty of the persons in charge of the train is prescribed by statute, and that duty is this — that they shall see either that the bell is ringing or the whistle is blowing at a distance of 900 feet from the crossing, and that the bell is kept ringing or the whistle is kept blowing from that point up to the crossing. The law does not require that both the whistle and the bell shall be kept sounding, but that one or the other shall be continuously sounded from a point 900 feet away from the crossing up to the crossing. If the persons in charge of that train show that that was done, then that is the end of their inquiry as to their negligence; they had performed all the duty which the law imposed upon them. If the bell was not ringing continuously or the whistle was not blown continuously from a point 900 feet from the crossing up to the crossing, then you ask yourselves whether that neglect of duty helped to cause the accident. You see, if the persons in charge of the electric car knew that the train was coming, then it was of no consequence whether the bell was rung or the whistle was blown, for the only object of ringing the bell or blowing the whistle is to apprise travellers on a highway near a crossing that a train is approaching. So that it is not merely the neglect of duty of the persons in charge of the locomotive, but it is, besides, that that neglect of duty helped to cause the accident. If you come to the conclusion that there was no neglect of duty on the part of the persons in charge of the locomotive, or that their neglect did not help to cause the accident, then the responsibility would rest upon the agents of the defendants — the motorman and conductor of the electric car, and your verdict will be for the plaintiffs in both cases, and it will be your duty to assess the damages in both cases. The Erie Company claims \$1,431 for the various items, with interest, which would make the amount of the claim of that company \$1,475. The Greenwood Lake

Company claims \$754 for its various items, and the interest would bring that amount up to \$775.

Now, if you conclude that there was negligence on the part of the persons in charge of the electric car, and also that there was negligence on the part of the persons in charge of the locomotive, and that that accident resulted from the negligence of both those agencies, still the Erie Company will be entitled to a recovery, for the persons in charge of the locomotive were not persons for whose conduct the Erie Company was responsible. Those persons were agents of the Greenwood Lake Company, and, as to the Erie Company, in this case, there would be no blame whatever. Therefore, if the accident resulted from the negligence of the defendants, even though the Greenwood Lake Company was guilty of contributory negligence, the Erie is still entitled to recover. The claim of the Erie will be defeated only if you conclude that the accident did not spring out of the negligence of the defendant company.

I am asked on behalf of the defendants to charge the jury that as soon as the engineer became aware that the electric car was about to cross the railroad track, it was his duty to inform the persons in charge of the car, either by ringing the bell or blowing the whistle, or doing both, or in any other way, that the train was approaching.

In substance, gentlemen, that is right. The general duty resting upon the persons in charge of the locomotive, was that all due care should be observed; and, of course, if the engineer perceived that the electric car was about to cross the railroad, it was plainly his duty to do whatever he could to give them special warning, if necessary, and do whatever he could to attract their attention to the fact that the train was coming. But if they had made up their minds to cross the road, although they knew the train was coming, then, of course, his blowing the whistle and ringing the bell would have nothing to do with the matter, and his failure to do so would have nothing to do with that accident. I am not aware that there is any evidence in this case which indicates that from the time the engineer began to be aware that there was danger at the crossing, he was able to do anything more than was done for the purpose of avoiding an accident. If you believe that he was in the exercise of reasonable care, able to do more, then his failure to do that, if it would have prevented the accident, was such negli-

gence as would prevent recovery on the part of the Greenwood Lake Company.

I am also asked to charge, that if the jury come to the conclusion that the defendants' servants were negligent, and by ordinary care the plaintiffs could have avoided this accident, the plaintiffs cannot recover.

I charge that with reference to the Greenwood Lake Railway Company. You will understand that the negligence of the plaintiffs can in this case mean nothing more than the Greenwood Lake Company, and the negligence of the Greenwood Lake Company can only affect it, and cannot affect the Erie Company.

I am asked further to charge that the Greenwood Lake railroad cannot recover unless the engineer rang the bell or blew the whistle at a point 300 yards before reaching the crossing, and continued so to do.

If the jury believe that the conductor and the motorman of the electric car did not see the approaching train, that is almost right; it puts the responsibility of ringing the bell or blowing the whistle on one of the persons in charge of the locomotive. It does not matter by whom the signal was given; unless one or the other sounded the signal continuously for 300 yards from the crossing, if the jury believe that the conductor or motorman of the electric car did not see the approaching train, and they would have seen it or heard such a signal if it were given, and avoided the accident in case the bell was rung or the whistle blown for that distance, the Greenwood Lake road cannot recover.

That covers, I think, all the instructions I have to give to the jury, and I will hand you this memorandum of questions to consider:

First, did the accident result from the negligence of the persons in charge of the electric car? If the jury answer "No," they need consider the case no further, but may render their verdict for the defendants. If the jury answer "Yes," then did the negligence of the persons in charge of the locomotive contribute to the accident? If the jury answer "No," then they must assess the damages of each plaintiff. If the jury answer "Yes," then they must find their verdict for the defendants in the suit of the Greenwood Lake Railway Company, but they must assess the damages which the Erie Company sustained.

§ 439. Charge by Mr. Justice Dixon, of the Supreme Court of New Jersey, action for the death of a person killed at a crossing by a collision of a locomotive with an electric car.—GENTLEMEN OF THE JURY: This is a suit brought by Mrs. Hackett, as administratrix of her husband, to recover the statutory damages for the death of her husband. In actions of this nature, the general principle is that the evidence must satisfy the jury that the accident resulted from negligence chargeable to the defendant, and it must not appear by the evidence that the accident was contributed to by negligence chargeable to the person whose death is caused. That is the general rule which is to be applied by the jury to the particular circumstances of each case, subject to some special rules that the courts have framed, if I may say so, under this general legal rule.

The first inquiry for the jury is whether the evidence shows that the accident resulted from negligence chargeable to the defendant, and that involves two inquiries. First, does the evidence show that there was any negligence chargeable to the defendant; and, second, does the evidence show that the accident resulted from that negligence.

The defendant was running its train across a public highway, and the statute prescribes what the duty of the persons in charge of the train under those circumstances is. The statute declares that it is the duty of the persons in charge of the train to begin to ring a bell of thirty pounds weight on the locomotive, or to begin to blow a whistle that can be heard for a distance of 300 yards, at a point at least 300 yards from the crossing, and then the bell is to be kept ringing, or the whistle is to be blown continually from that point until the locomotive reaches the crossing. Now, that is the statutory duty, and that in this case embraces all of the duty of the persons in charge of the train. The legislature has a right to regulate our use of public streets. The public use of the public highways is subject to regulation by the legislature, and this regulation is that which the legislature has made with regard to our use of the public streets when they are being crossed by railroad trains; and that, therefore, is the whole duty of the persons in charge of such trains. You will notice that the statute does not require both the ringing of the bell and the blowing of the whistle continuously from a point 300 yards away from the point of crossing of the street; the statute re-

quires only the one or the other. If either be done, then the persons in charge of the train have done their full duty; so that you see in this case you simply ask yourselves, does the evidence satisfy you that there was neither a continual ringing of the bell nor a blowing of the whistle from a point 300 yards away from the crossing up to the time when the locomotive crossed the street. If the evidence satisfies you that neither of those things was done throughout that distance, then the persons in charge of the train failed to discharge their statutory duty, and their failure is imputable to the defendant.

Now, in this particular case, there may be a further duty, not on the persons in charge of the train, but on the railroad company itself outside of those persons. It appears that the company has located its track through or alongside of a bank, rising from seven to eleven feet above the level of the track, and that that bank runs up to the street which crosses the railroad track, or nearly up to the street, and that in that street there is an electric railway track, and that it is a public highway commonly used by the people of the vicinity. Now, then, if you think that the existence of that bank rendered the use of this railroad especially dangerous, so that, in the ordinary use of the road, this statutory signal would not give reasonable warning of the approach of trains, then it is for you to say whether the railroad company should not have provided some other notice of the approach of a train, such as the construction of a gate or the presence of a flagman. But you could only say that such a duty on the part of the railroad company existed, provided you came to the conclusion that because of the existence of this bank the use of the railroad was extra hazardous to the people using the street, to such an extent that the ordinary statutory signals would not give fair warning of the approach of trains. Should you come to that conclusion, you would have the right to exact of the railroad company itself the duty of giving some visible notice that the train was approaching, and a failure to do what you think ought to have been done under those circumstances, would be negligence chargeable to the company.

If you find that in none of these particulars there was negligence, that, of course, ends the case, and your verdict should be for the defendant. If you find in any of these particulars that there was negligence, then the second inquiry arises, did the

accident result from that negligence? If no, then your verdict should be for the defendant. If yes, then you come to the next inquiry, which I stated in my first remarks, that is, does the evidence in this case lead you to think that Mr. Hackett, who was killed, helped to cause the accident by any negligence attributable to himself? If the evidence does lead you to think so, then there will be no recovery, for the law is clear that if both parties are negligent, then there can be no recovery against the defendant. So we come to the question again as to whether the negligence of Mr. Hackett helped to cause the accident. The general rule with regard to persons using the streets and about to cross railroads is this, and it is the same rule that regulates our conduct in almost all the relations of life, that the person must exercise reasonable care to save himself from injury. He must do what reasonably prudent persons under those circumstances ordinarily would do. This is a general statement of the rule. Now, that general statement of the rule has under it a rule which the courts have adopted, and which is thoroughly well settled and it is this: that a person going along a street and about to cross a railroad must look and listen before he crosses the railroad, and he must look and listen attentively; he must have his mind upon the fact that he is approaching a railroad track along which railroad trains may be running, and he must look and listen attentively for the purpose of ascertaining whether a train is approaching, and if one is approaching, he must take no chances in crossing. He must wait until the train has passed; he must not take any chances about it. It has been suggested in argument that there was some duty resting upon the people in charge of the railroad train to stop if they saw a trolley car approaching the track. There was no such duty resting upon the people in charge of the railroad train; they had the right to anticipate that persons approaching the railroad, whether they are on foot or in wagons, or on trolley cars, will stop and give them the right of way, and they are not called upon to stop or to make any effort in that direction until it becomes plain that an accident is imminent. They have a right to anticipate that persons using the public highway will stop and give them the right of way. So I say it was the duty of Mr. Hackett on approaching this railroad crossing to look and listen attentively, and if he was apprised that there was a train approaching, it was his duty to wait until the train had passed. Now we have laid before us with quite con-

siderable precision the circumstances upon which Mr. Hackett was called to square his conduct by this duty. He was conductor of the electric car; he knew that he was approaching a railroad track; he had been on that crossing for several months going backward and forward every ten or fifteen minutes throughout the day. It must be presumed that he knew all about the existence of this bank between him and the railroad track; and what did he do, and what did he give consent to have done? Why this, he consented that that car should be stopped about twenty feet from the track, and then should be started on to cross that track. That is the thing that he consented to have done; indeed, it is a thing that many times a day he participated in doing. He knew that it was the rule of his company that the car should be stopped about twenty feet from the crossing, but the performance of his duty to the company was not all that was required of him in this case. The question is, not whether he was performing or violating his duty to the company, but the question is, whether he was doing his duty to himself or to the railroad company whose track he was about to cross. That is the question; and that required him to exercise such care as prudent persons ordinarily exercise under such circumstances as he was placed in; but it would require him (to use the more explicit rule) to look and listen attentively before crossing the track. Now, looking and listening attentively means this: that whenever you can safely get to a place where you can see, that is the place where you are to go to look. It is idle to have a rule that you are to look if you are to be absolved because you have looked from a place where you cannot see. The rule that requires one to look attentively necessarily requires that if you can safely come to a place where you can see, that is the place where you are to go to look. And so the rule that requires that you shall listen before you cross a railroad track means that you shall listen at a place where you can hear; and so the courts have laid down the rule that when a man approaches a railroad track making so much noise that he cannot hear, he must put an end to the noise before he tries to hear; and so the same rule applies that a person must reach a place where he can hear before he listens, as well as one where he may be able to see before he looks. The inquiry here is, did Mr. Hackett discharge this duty by looking from a place where with safety he could see? Now, our law does not lay down expressly that a man must stop before

crossing a railroad track. Sometimes it might be dangerous to stop at a place where you can see, if driving a horse and wagon. In this particular spot, it would be dangerous for a man to stop at a place where he could see, for according to the evidence a man must approach within something less than twenty feet from the railroad track before he can see as far as the bridge; he must be in the neighborhood of seventeen or eighteen feet from the rail, I think one witness said, before he can see to the bridge. Now, if a driver of a horse and wagon is fifteen or seventeen feet away from the track his horse is very close to the rails; and if a train came whizzing along so close to the horse's head as that would bring it, he would be in very great danger, and it would be unreasonable to insist that a man should place himself in such danger. But Mr. Hackett was not in that condition; Mr. Hackett was not driving a horse and wagon. Mr. Hackett was in control of a machine; and the machine could not be frightened, no matter how close to a passing train; and the thing that he consented to was that that car should stop twenty feet away from the track when if he had had the car move five or six or eight or ten feet closer the motorman would have been in a position where he could see. Now, then, could the motorman have come up to that point with safety and looked? If he could, that was the place to which the law required that he should come in order to look; and it would not be a performance of his duty on the part of Mr. Hackett to have the motorman stop to look twenty feet away, where he could not see, provided if he went to a place where he could have seen and still have been in safety, he might have seen the train approaching. That is a question for you, gentlemen, whether Mr. Hackett, by consenting to and participating in this practice, was performing his whole duty, in view of all the circumstances of the case. If you think he was, you have reached the conclusion that there was no contributory negligence on his part; and if you find negligence on the part of the defendant, you will then find your verdict for the plaintiff. But if you conclude that Mr. Hackett did not fulfill his duty, and partly out of that the accident sprung, then your verdict should be for the defendant.

Now, if you find your verdict for the plaintiff, your next duty is to see how much the recovery should be. This is a statutory action altogether, and the statute prescribes the rule by which the verdict shall be regulated. It prescribes it, indeed, in gen-

eral terms, so as to leave much to the judgment of the jury. It cannot prescribe such a rule as it would have for measuring a carload of wheat, or anything of that sort; but it does prescribe that the damages shall be limited to the pecuniary loss of the widow and next of kin, nothing for injury to the feelings of the widow because of the death of her husband; nothing for injury to the feelings of the children for the death of their father; it is the pecuniary loss — what they have lost in dollars and cents only, is what the statute permits to be recovered in a suit of this sort. It appears that the earnings of Mr. Hackett were \$12 or \$13 a week. Out of that, of course, must come such money as he must spend about his person — his clothing, his board — whatever spending money he chose to use. The balance would be the pecuniary contribution that he was making to the support of his family; and that would be the basis on which you would measure the amount of the loss of the widow and children. The loss of this contribution that he was making to their support out of his earnings may be such sum as you will think will compensate them for the loss, and then you will have done what the statute requires — provided, of course, you find for the defendant.

§ 440. A like charge by Mr. Justice Dixon, for an accident at a grade crossing.— GENTLEMEN OF THE JURY: On the 10th of February, last, about nine o'clock in the morning, a collision took place on Summer street, this county, between the plaintiff, who was driving a team of horses and a train of the defendant company, and as a consequence of that collision, Mr. Green was injured and he seeks in this suit to hold the railroad company responsible for his injuries. In order that he may recover — that he may sustain his action — the evidence must satisfy you that the accident resulted from some negligence chargeable upon the defendant. And even if the evidence satisfies you of that fact, yet, if it further satisfies you that some negligence on the part of the plaintiff contributed to the accident, your verdict must be for the defendant. These are the rules of law which, largely, are to govern you; keep them in your mind. In order to entitle the plaintiff to recover, the evidence must satisfy you that the accident resulted from negligence chargeable to the defendant; and even if the evidence does satisfy you of that fact, if the evidence also satisfies you that some negligence on the part of the plaintiff contributed to that accident, then your verdict

should be for the defendant. Your verdict will be for the plaintiff, only in case you find that the accident was chargeable to the negligence of the defendant alone. Bearing these rules in mind, there are two or three suggestions I purpose making to you. First with regard to the conduct of the defendant, the question of the negligence chargeable against the defendant. Negligence is lack of reasonable care, or failure to observe some duty, which, either in law or in reason, rests upon the party under the particular circumstances in which he is placed. In the present case the plaintiff claims that there were duties resting upon the defendant, imposed by law — statutory law; and a further duty aside from that prescribed by the statute; that the company, or its agents, which is the same thing, failed to discharge these duties, or some of them, and so the accident occurred; that is the contention of the plaintiff. Now, there was resting upon the defendant a certain statutory duty, and that was this: It was the clear duty of the persons in charge of the train, either to keep the bell continuously ringing, or the whistle continuously blowing for a space of 900 feet, before reaching the crossing. You see, that does not require that both things shall be done; it is not necessary to both ring the bell and blow the whistle; but it is necessary to do one or the other of them for 900 feet before reaching the crossing.

The plaintiff contends that that duty was not performed, and on the other hand the defendant's agents testify that it had been performed. With regard to the ringing of the bell, it is testified that when the train left Paterson the automatic bell was started to ring and continued to ring until the engineer stopped it immediately after the accident occurred. With this conflicting testimony, it is for you to decide where the truth is. The evidence on the part of the defendant is positive on that point. The engineer gave positive testimony of the ringing of the bell. The testimony on the part of the plaintiff on this point is rather negative. Simply being in a position to hear, I did not hear, that is the character of the evidence; which is the more conclusive, you must say. If you conclude that the bell was rung through the 900 feet, that statutory duty was performed, and no fault can be charged upon the persons in charge of the train at all; if you conclude that the bell was not rung, why then there was a fault on the part of the persons in charge of the train; and if the failure to ring the bell was the cause of this accident,

that would be a ground for recovery in this case, subject to what I shall presently say, but whether the failure to ring the bell, if the bell was not rung, was the cause of the accident, is still a question for you to consider.

Ask yourselves whether, in view of the speed of the train, in view of the conditions existing there then, if the bell had been ringing it would have made any difference in the occurrence of this accident. If you think it would not, why, then, of course, the failure to ring the bell had nothing to do with the occurrence of the accident at all. If you believe the bell was rung, or you believe that it was not rung, and yet the ringing made no difference, why then you may leave out of consideration the matter of the ringing of the bell. The statutory duty would either have been performed or would have become unimportant in the case.

The plaintiff insists that besides this statutory duty there was another duty resting upon the defendant company. And possibly there was. Whether there was or not you must decide. The rule of law with regard to that is this: If the railroad company has constructed its road in such a situation as to create extraordinary dangers at a highway crossing, then they are bound to guard against such dangers by the use of extraordinary precautions. These precautions prescribed by the statute which I have before referred to, are intended for the ordinary highway crossings. But the law says, if it appears in the case that the railroad company has constructed its road so as to create extraordinary dangers to persons travelling upon the highway, then there is a duty resting upon the company to guard against these extraordinary dangers by the use of extraordinary precautions. And the plaintiff contends in this case that the fact that this road is so constructed that from this highway crossing a train will not come into view at all, until it is within about a quarter of a mile or so of the crossing, and because there is another curve around the hill, behind which it will be hidden, and out from which it will not emerge again until within 300 or 400 feet of the crossing, the plaintiff contends, by reason of these circumstances extraordinary dangers were created to persons travelling across this track or street, and for that reason, the plaintiff insists, extraordinary precautions should have been used, either a gate, or a flagman, or some additional signal which the company should have arranged. That presents a question for you: Do you think that these curves, these woods, this hill made this

crossing extraordinarily dangerous? If you do, then you would have a right to say that the failure of the company to provide extraordinary precautions against that extraordinary danger was an act of negligence, or undutifulness on the part of the company, for which it would be responsible. If you conclude that such extraordinary precaution should have been employed, you will ask yourselves, "Did the failure to exercise that precaution cause this accident?" Think to yourselves what reasonable precaution should have been provided and ask yourselves, "Would that precaution in this particular case have prevented the occurrence, probably?" If it probably would not, why then, of course, it is of no consequence; if it probably would, its absence becomes an effective cause of the accident, and would justify your finding against the defendant on that ground. If after considering all of these propositions which I have stated to you, you come to the conclusion that the company, or the persons in charge of the train were in fault, and that fault was the cause of the accident, you will then turn your attention to the plaintiff's conduct; for, as I have before stated, if the plaintiff was to blame and his misconduct helped to cause the accident, he cannot hold the company responsible; he must bear the misfortune himself.

The duty of the plaintiff when about to cross this track was to use his eyes and ears in order to protect himself from danger. That is a particular statement of the general rule; he is bound to be careful. A railroad track is a place of danger, when crossing it with horses, and a person who is going across it is bound to exercise commensurate care. As a place of great danger he is called upon to exercise great care. Although the rule is only ordinary care, reasonable care, that which is reasonable care rests with the danger; the greater the danger the greater the care. Inasmuch as a railroad track is a place of great danger, a man approaching to cross it should exercise great care to avoid it.

Now, you have heard what has been told with regard to the opportunities for observation at this point. Going from Central avenue into Summer street, the first thing to prevent a view of the road was this shop. When the railroad passes that street it comes within thirty-eight feet, I think; the first rail of the railroad comes within thirty-eight feet of this shop. The plaintiff says that as he approached the railroad crossing on Summer

street, he looked towards Paterson, towards the north, and, he says, so far as he could see, the track was clear. The tendency of his testimony is to indicate that it was only possible to see the track for 300 or 400 feet; from that point the hill would interfere with his vision, while the testimony of Mr. Robertson is to the effect that it was possible to see for 1,300 to 1,400 feet; and I think the testimony of the surveyor is that it was possible to see 1,800 feet. He says he looked and he didn't see the train. Whether he did not see it because it was not then within visible distance, may be a question that the consideration of the speed at which he was going, and the speed at which the train was going, may help you to a solution of. His speed was a slow walk, it is said, and I suppose the slow walk of a team of horses is not more than two or three miles an hour, which would be about three to four and a half feet in a second. And for that thirty-eight feet it would take his horse to walk out to the rail ten or twelve seconds, perhaps.

Now, the speed of the train was very high. Its run from Paterson to Jersey City is accomplished in twenty-five minutes — its regular run. This distance is a little over fifteen miles. To accomplish that an average speed of thirty-seven miles an hour must be kept up. The engineer testified that in two places the speed slackened; one, as I understood him, is as they approach the Passaic bridge, going around the sharp curve there, and the other is going through the tunnel; so that the speed of the train at this point was at least forty miles an hour. That is sixty feet in a second, or thereabouts; so that it would travel the 1,800 feet in about thirty seconds; 1,300 feet in about twenty-two seconds and 400 feet in about six or seven seconds. Now, then, the question is whether the evidence leads you to believe that when Mr. Green drove along Summer street and came to that shop and looked to the west, he failed to see that train because it was not yet within a visible distance on the track. If it was not, of course he was not to blame for not seeing it. But, if it was, then the question you are bound to ask yourselves, is "Did he look carefully?" As I have already intimated, he was bound to be careful. He was bound to exercise a high degree of care. He was bound, not merely to look, but to look carefully; to look for the purpose of seeing whether a train was coming or not. Did he look that way? Did he look carefully? If you conclude that he did not look carefully; that if he had, he

would have seen the train approaching and have kept off the track, then he cannot recover. But, if you think he looked carefully, why, then, he did his duty for that moment. Then he says that he turned in the other direction, and there was a train approaching, so far away that he was satisfied that he could cross with safety; and then, having satisfied himself in both directions that there was no danger coming, he proceeded to cross and drove his horses upon the track, when suddenly danger flashed into his vision. Now, then, if you have determined what he did, ask yourselves whether he did anything that reasonable prudence required of him, and whether he did anything which reasonable prudence forbade. If you think that his conduct comes up to that standard, so that he did only what reasonable prudence would warrant, and did everything that reasonable prudence would dictate, why, then he is not responsible.

When a man is brought into a position of perplexing danger, such as a man is when upon a railroad track with a team of horses and he sees trains approaching in both directions — when in that position of perplexing danger, you don't hold him responsible for a mere mistake of judgment. It is possible, perhaps you think it probable — you may feel certain that, if at the instant when this train flashed into Mr. Green's view, he had at once stopped his horses and backed them, he would have escaped, because the train coming from the left could have slowed up and would not have touched him; it would have stopped if necessary; while the other train, it, was impossible to stop. Yet, even if you should conclude that that would have saved him, if he had done it, yet the mere fact that in his perplexity he made an error of judgment and drove on, so that he actually went into the danger, instead of keeping out of it, why that would not be chargeable to him as a failure to exercise reasonable care.

These, gentlemen, are the considerations upon which you are to decide this case. If you conclude that the defendant should not be held responsible, you will say so. If you conclude that the defendant should be held responsible, you will then assess the plaintiff's damages. In assessing his damages, you are to take into consideration loss of time, his expenses and his general discomfort, whether in the past or probably in the future. But do not, with regard to the future, be led away by guesses and possibilities. You will readily see what an idle task it would

be for a jury to enter into the consideration of the possibilities of an occurrence of this nature. You may cut your finger, and it may be that gangrene will set in and the loss of an arm or your life is within the limits of possibility. Do not trouble yourselves with possibilities; deal with probabilities; and as to them, you are not bound to take the conjectures of physicians; exercise your own good judgment. What you see is that Mr. Green appears to have been improving since the accident. Pain that was continuous at first, and severe, has now become only occasional and not severe. Disability that he suffered from at first is gradually passing away, and he is apparently able to perform with reasonable care his daily duties. Not completely, for he has occasional twinges of pain in his back, but is it not reasonable to hope and believe that as time wears on, this occasional pain will disappear, and he will be entirely well.

Exercise good judgment about it and give him fair compensation.

§ 441. Charge by Mr. Justice Dixon, of the Supreme Court of New Jersey, action for injuries caused by a collision of an electric car with an omnibus.—GENTLEMEN OF THE JURY: On the 6th of August last, about 9 o'clock in the evening, a trolley car belonging to the Atlantic Coast Electric Railway Company, the defendant in this suit, and in charge of Mr. Grant, the motorman, ran into a team of horses and a stage belonging to the plaintiff, Joel Wilson, and driven at that time by the other plaintiff, John Rennard. Through that collision, John Rennard sustained personal injuries, and Joel Wilson sustained the loss of the entire turnout, and for these damages Rennard and Wilson claim compensation at your hands.

In determining whether they are to receive compensation, it will be enough for you to look at the conduct of Rennard and the motorman, Grant, and if on an examination of their conduct, under the rules of law, you come to the conclusion that Rennard is entitled to recover compensation, then Wilson will also be entitled to compensation for his loss; but if you come to the conclusion that Rennard is not entitled to recover compensation, then you must also deny to Mr. Wilson any compensation for his loss, for at the time Rennard was the servant of Wilson, and if, in an accident like this, the conduct of the servant is such that he is not entitled to recover for his injuries,

then his master is not entitled to recover for his loss. So that you see, if you find a verdict for Rennard, you must find a verdict for Wilson also. If you find a verdict against Rennard, you must find a verdict against Wilson also. But you are to render two verdicts; that is, one in each of these two cases which you are trying.

Let us look at the occurrence itself and I will endeavor to indicate to you what the rules of law are, which are to guide you in your consideration of the circumstances, and I may say that my duty is by far the easier of the two. My duty does not call for the exercise of much judgment on my part; it calls for the exercise only of a little recollection in regard to the rules of law that have been thoroughly established with regard to matters of this kind, but your duty calls for the exercise of sound judgment; calls for the exercise of memory to recall the various transactions as given in the testimony, so that you may discover what the real truth was, and then the exercise of good, sound judgment, so that you may apply those rules of law that I shall give you to the real facts that you determine to have existed, and out of them conclude whether the plaintiffs are entitled to recover or not.

The trolley cars and the stage were both approaching the same point and the driver of each had a right to propel his vehicle across the path on which the other was coming, but, in the exercise of his right, each of these persons, Rennard, the driver of the stage, and Grant, the driver of the trolley car, was bound to exercise reasonable care for his own safety and also for the safety of the other party; each was bound to exercise reasonable care to keep out of danger himself and not to put the other party in danger either. By reasonable care, the law means that degree of care which, under the existing circumstances as the jury really find them to have been, an ordinarily prudent person would be likely to exercise. You see in that definition, which is as close a definition as the law gives you, there is a great deal of room for the exercise of your judgment. What sort of a man in your judgment is an ordinarily prudent man? you are to say, and then, what are the circumstances in which the ordinarily prudent man would be called upon to act, and then what degree of care would an ordinarily prudent man be likely to exercise under those circumstances? All that is for you to consider and that is the standard up to

which you are to hold both Rennard and Grant. You are to inquire whether these men, in exercising their right of crossing each other's path, exercised that degree of care which a reasonably prudent person would be likely to exercise under those circumstances. If you find that Rennard did not do that, then he is to blame for the accident, and if you find that Grant did not do that, then he is to blame for the accident. And according to the determination of the question as to where the blame lies is to be your verdict in this case. Now, you can see that there are four possible conditions. First, Rennard may have been the only person to blame. He may have been the only person who failed to do what a reasonably prudent person probably would have done under the circumstances, or who did something that a reasonably prudent person would not have done under the circumstances, or Grant may have been the only one to blame. He may have been the only man that failed to come up to this standard that I have indicated to you; or both may have failed, or neither may have failed. The accident may have been a pure accident, not brought about by the negligence of either of these persons. Now, in only one of these four possible conditions can your verdict lawfully be for the plaintiff. If it was a pure accident, if neither of these men was to blame, then your verdict must be for the defendant. If both were to blame, then your verdict must be for the defendant, and for a reason that when the party injured and the party inflicting the injury, both, by their negligence, have contributed to the accident, the law says the damage must remain just where it fell. The law does not help either to compel the other to pay for the loss that he has sustained. So you see, if both were to blame, your verdict must be for the defendant.

If Rennard alone was to blame, your verdict must be for the defendant.

Only in case you find that the blame all rested on Grant can your verdict be for the plaintiff. Your first inquiry should be under which of these four categories this case is to be placed.

The plaintiffs insist that all the blame rests on Grant, and they say that he was to blame in three particulars. In the first place, they say he was not properly on the lookout for the purpose of seeing whether vehicles were approaching the crossing and liable to be crossing in front of his car. In the next place, they say that he was not attending to his brake or his reverse

power; not exerting the means at hand of stopping his car, after he had discovered that Rennard was likely to be crossing the track in front of him; that he did not stop as soon as he, in the exercise of reasonable care, should have stopped, and in the third place, they say that even if he did try to stop as well as he could, as soon as he discovered Rennard approaching the track, yet that he was going at so high a rate of speed, that if he had been a prudent man, exercising reasonable care, he would have seen that he would be likely to injure persons who might be crossing his path in front of him; and they say in each one of these three particulars, he failed to do what a reasonably prudent person under those circumstances would have done, or did that which a reasonably prudent person under those circumstances would not have done. You are to decide whether the evidence satisfies you that in any one of those particulars Grant failed. If it does not, that, of course, is an end of the case, for, as I have told you, it is only in case the whole blame rests on Grant that the plaintiff can recover, but if you find that in any of these particulars he failed to come up to the standard and that through that failure, the accident happened, why, then, you go on to look at the conduct of Rennard, to see whether his contributory negligence should bar the recovery of the plaintiffs.

The defendant contends that Rennard was to blame in this particular, that even though he could see that he would be likely to get to the crossing first, yet, had he been fairly on the lookout, he must have foreseen that to attempt to cross first was to run into danger; that had he acted as a prudent man, it would have appeared to him that, considering the speed at which the car was actually going and its proximity to the point of crossing, if he attempted to cross there would be danger that the car would run into him. The defendant insists that in that respect he did not take such care of his own safety and the safety of the team and persons in his charge as a reasonably prudent person ought to have done. If you think that, as I have already indicated to you, that ends the case and ends it in favor of the defendant, under the rule that even though Grant was negligent, yet if Rennard was also negligent and the negligence of both helped to cause this accident, then the law leaves the loss just where the accident placed it, and neither can compel the other to compensate him for the injury. Those are the rules and they are all the rules that the court has any right to lay down to you and all that I

mean to lay down to you for the purpose of guiding you in determining whether, in this case, these plaintiffs shall recover or not.

I have a number of requests here from the defendants to charge. There are only four of them with which I will comply, and I think probably they are covered by what I have already said, but I will instruct the jury in the very language of these requests. The first one which I read is marked No. 3: "If the jury believe that the plaintiff Rennard, while he was still in a place of safety, saw the defendant's motor car approaching, in dangerous proximity, at a high rate of speed, and nevertheless attempted to cross and was injured, he is guilty of negligence contributing to the injury and cannot recover."

The important circumstances there enumerated, are these, that he saw it in dangerous proximity, coming at a high rate of speed. If the rate of speed was not evident to him, and if the proximity was not such as to be dangerous, then you see this charge is not applicable.

The next that I read is marked No. 7: "That in approaching this crossing, the plaintiff Rennard was bound to use his powers of observation to discover approaching motor cars, and a like judgment when and how to cross without collision, and if he failed in either of these respects, or observing, disregarded the warning, he cannot recover."

The next one that I read is marked No. 11: "The plaintiff Rennard was bound to use at least such precaution as a reasonably prudent man would use under the circumstances, and if he failed in the performance of that duty, he was guilty of negligence contributing to the injury and cannot recover."

The last one, No. 14, I have already charged that: "As to the plaintiff Wilson, that he is charged with the negligence, if any, of the driver Rennard, and cannot recover if Rennard is held or found to be guilty of contributory negligence."

With regard to the amount of recovery, Wilson, if he is entitled to recover, is entitled to recover the fair market value at that time of his horses, wagon and harness. What that was, you must say. The evidence differs somewhat and you must decide.

Rennard, if entitled to recover, is entitled to have compensation for his suffering, and that, you see, calls for sound judgment. You must not ask yourselves, "Well, how much would I take to pass through such an accident and take the conse-

quences?" If you asked yourselves that, then you would be judging your own case, and the law does not allow a man to judge his own case; it would not do to put Rennard in the jury box to award damages to himself, and it would not do for you to ask yourselves, "How much would I award to myself, if I was the plaintiff?" but you must exercise your sound judgment in saying what would be a reasonable compensation to him, for the suffering that he has endured and probably hereafter may have to endure, and then he is entitled to compensation for his loss of time; for his loss of earning capacity; for his loss of full ability to enjoy life as he otherwise would have enjoyed, and a fair compensation for whatever expenses he may have incurred, which seem to have been light in the past and probably will be in the future. Those are matters to be covered, and in estimating them you must exercise a good, sound, sober judgment.

§ 442. Charge by Mr. Justice Garrison, of the Supreme Court of New Jersey, action for causing the death of a father and husband, by a trolley car.—GENTLEMEN OF THE JURY: This action is brought to recover for the loss which a widow and orphans sustained by reason of the killing of the husband and father. Anciently such an action could not be brought. At the old common law one could bring an action for an injury to the person, that is, a person who sustained an injury could bring an action against a person who wrongfully injured him, and in such an action could recover not only for the actual money damage that he could show, that is, the loss of ability to support himself, but he could also recover for the inability to enjoy the pleasures of life; he could also recover for mental or physical suffering, for pain, doctor's bills and all such things. But when the act of the English Parliament first, and our act of the legislature afterwards, gave this right to recover for killing a person, they limited the thing for which a verdict could be recovered to one class of damages, and that is, for the pecuniary or moneyed loss which the family that survived and who otherwise would expect reasonably to be supported out of the earnings of the deceased person had sustained by his death. The thing that they could recover was limited to that. So that in a case of this kind damages can go against a wrongdoer who has killed a husband and father of a family only for the amount of money which the jury find he would have ex-

pended, had he lived, upon his wife and children, — not what he made, but what they find he would have expended for the support, maintenance and education and those other things which a man does for his wife and family. There can be no recovery for mental suffering — no recovery for the anguish of a wife — no recovery based upon sympathy. The whole matter is a question of fact as to what amount of money the proof shows the man would have expended upon his family had he lived. Now, of course, you will consider in the first place how long you believe he would have lived. You have heard how old he was and what his health was, and it is a matter of common knowledge as to how long the average duration of life may be. You are not to consider exceptional cases, but you will take the average length of life. I will not, therefore, attempt to state statistics to you, but you all know the average of the life of man is made up of some men who live to be over ninety years, and some who die before they are a year old. So you will take the average, and not an extreme term.

Then you are to consider as one of the elements how much, during all that time, you believe he would have earned. Not how much you believe he would have made this year or last year, but how much you believe he would have made during the time you believe he would have lived, and of that how much you believe he would have expended upon those who are to be benefited if this suit should be determined in favor of the administrator — In other words, the wife and children.

Now, there is another thing which you should be reminded of in that respect, and that is that in case there should be a verdict for damages in this case and you should believe that the man would have lived for a certain number of years, and that he would have expended a certain sum of money each year on his family, it would not do to multiply that annual sum by the number of years, for the reason that, in that case, you are not compelling this defendant to pay each year that much to the family, but you will be compelling them to pay it down in a lump sum, so that the family would get in that case the first year all of the money with all of its interest-bearing capacity. You will do well to endeavor to find, not what would result from multiplying the individual expenditures on the family for the whole number of years, but what sum of money would represent the present value of all that sum so that it would bring it out in the manner in

which you could justly desire it to be brought out if you based it upon a given individual payment.

Now, your award of damages in a case of this kind being limited, therefore, to a money loss to the family, the question upon which your verdict turns is whether the death was caused by the negligence of the defendant company. Now, negligence in this sense means whether the death was caused by the wrongful act of the defendant; in other words, whether the company killed this man because the company was not performing its legal duty at the time, and that as a result of that the death occurred.

Now, without going into any abstract questions of law, it is sufficient to state to you that the trolley company was on this street as of right under an act of the legislature of this State, which has been declared by the Supreme Court to be a constitutional act, so that the company had a perfect right to be there with its cars and to operate them at the point in question as elsewhere along that street. It is needless to say that every citizen has likewise a right to be on that highway.

Now, the accident or the occurrence in question (limiting what I have to say to the facts, the testimony in the case) may be conceived to have occurred in one of three ways. It may have occurred because the motorman went on, seeing the man on the track, for the purpose of putting him off. That is one conception of the occurrence which may arise from the testimony.

Another is, that owing to the manner in which the driving was taking place the man in the dog cart may have been off the track at the time when the trolley car went to pass it and may have driven on to the track in time to incur the accident. That is another plausible conception which arises by fair inference from certain views of the facts.

A third possible and not unreasonable view of the facts is that the party with the dog cart was on the track, sometimes on and sometimes off, and that he, at the time that the trolley came up behind him, gave an indication which to a reasonable person would indicate that he was about to leave the track, and under those circumstances the car may have gone on.

Now, to each of these three a different rule of law appertains. As to the first — if the car was driven by the motorman on to the wagon which was on the track for the purpose of making him get off, then the company is certainly liable. A company that drives its car against the vehicle of a passenger on a highway

for the purpose of forcing him off the track is liable as negligent.

The second would call for a different rule, and that is, if you believe (and everything depends on what your minds believe from the testimony) that the man was off the track at the time when the trolley car attempted to pass and then drove on, and if he was so off the track that it would be a reasonable thing for the car to pass him, then the company is not liable. The company is not obliged to insure against accidents. It simply insures that it will act in a reasonable way.

Now, it is reasonable when a wagon is off the track, for a trolley car driver giving the proper signals or making the ordinary noises of the car, to assume that in ordinary cases, particularly in the case of an open wagon, that the driver will not drive on to the track with the car immediately alongside of him. Therefore, if the dog cart was clearly off the track and did itself turn on to the track, then the fault was not that of the company. So you see there is one extreme in which the company would be in fault if they tried to put him off, and there is another extreme in which they would not be in fault, namely, if he, being off the track, turned on to the track immediately in front of the oncoming car.

But it may have been that he was partly on and partly off at different times, "wobbling," as one of the parties said, sometimes on the north track and sometimes on the south; sometimes on and sometimes off. Now, in that case, you must apply the common-sense rule of reasonable conduct, and in that case the trolley company is liable if its driver did not act as a reasonable man would act, a reasonable driver, having knowledge of such a car. Such a man driving a car of this kind has a right to make all reasonable deductions. He has a right to imply that the other party will act in the way that human beings ordinarily act if he is making the ordinary noises of the car and giving the proper signals. If he believed that the driver of the wagon was leaving the track and that the man would not come back on the track again, and that he would be clearly off the track when the car going at the rate of speed at which he was approaching it, would reach him, then it becomes a mere question as to whether that was a reasonable inference from the facts. If it was, then his employer is not liable.

If, on the other hand, the driver of the car acted hastily or

acted wantonly, and did not give the parties in the dog cart sufficient time to get off, or, above all, as I say, if he drove upon him for the purpose of facilitating or hastening his getting off the track and thereby struck him, then it is for you to determine whether such an act would be reasonable under all of the circumstances.

This is not a technical rule, although stated in these three different ways. In each case it comes down to the rules of real common sense as to the way in which an ordinarily prudent man would have acted under all the circumstances of the case.

If you find that the driver of this car acted with ordinary prudence as a reasonable man, then the company was not guilty of negligence. If, on the other hand, you find that he fell below the standard, that he did not act as a reasonable man, then it is for you to say whether he was guilty of failure of his duty, his duty being to act as an ordinarily prudent man does act under such a condition of affairs.

I am requested to charge:

First. That if the jury believe from the evidence that the trolley motorman gave full and fair notice by ringing the bell, it was the duty of the carriage driver, the decedent, proceeding in the same direction, to drive on some other part of the road and allow the trolley car to pass, and if he did not, he was guilty of contributory negligence and plaintiff cannot recover.

I refuse to charge that in the form in which it is there stated. I understand the request to be that it is the legal duty of the person to get off the track. I decline to charge that.

Second. That if the jury believe from the evidence that plaintiff's decedent was driving at the time of the accident and was intoxicated, and for this reason did not observe the ringing of the bell, or the noise of the trolley, or light of the same, he was guilty of contributory negligence, and plaintiff cannot recover.

Undoubtedly the condition of the decedent as to intoxication is a very important matter to be considered on the whole case, not only because you would take a different view of his actions, but because he cannot claim the right to so deaden his senses that ordinary signals would be unappreciated by him. Therefore, to that extent I charge what has been said and what I have just read to you. If you believe that his death was occasioned not immediately and wholly by the shock, but was contributed

to by the fact that the shock would not have knocked him from his seat but for his intoxicated condition, then this undoubtedly must be the rule of common sense. It is admitted that the horse was not knocked down, and that the other party in some way escaped unhurt, so far as the evidence in this case shows; and it is for you to determine whether the reason why the decedent was so fatally and terribly hurt was due immediately to his own condition, brought about by himself, if you find as a fact that he was intoxicated. Of course the question of his intoxication is one which you will settle by the evidence, the testimony which you have heard in this case. If you find that he has not been shown to be intoxicated, dismiss it from the case. If you find he was, then you must take into consideration the intoxicated condition of the driver, the decedent, and that would be an important factor in the case.

Third. That the trolley car had on its tracks the right of way, giving due warning of its approach, and the decedent, proceeding along the road in the same direction in a carriage, was bound, on warning, to drive on some other part of the road, which was shown to have been fifty feet wide; and the motorman had a right to believe that the decedent would drive on the other part of the road, and decedent's so staying on the trolley car track was contributory negligence, and plaintiff cannot recover.

I refuse to charge that it is contributory negligence for him to remain on the track. I do charge you that if reasonably prudent people ordinarily get out of the way that is a fact, if it be a fact, that the motorman had a right to consider and take it in connection with any testimony tending to show that the wagon was actually getting out of the way. If it be a fact that motormen ordinarily find that people get out of their way or they find the man ahead of them making motions which to them or to an ordinary man would indicate that the vehicle was getting out of the way, and if you believe that to be a reasonable rule of prudence, then that is a matter for you to consider, and to that extent it would be reasonable conduct for him to guide his car in accordance with that common rule.

Fourth. That there is no proof that the motorman went on for the purpose of pushing the carriage off the track and so struck the carriage.

I do not charge that he must have done it maliciously, but I say if the carriage was on the track at the time that he pushed

against it, and that he pushed against it because it was on the track, (and you will remember that he said to the conductor that he expected some trouble) you may consider in that case that the company was undoubtedly guilty if the car tried to push the wagon off the track in order to get it off. I consider there is sufficient evidence for that to be one of the propositions for you to consider.

§ 443. Charge by Mr. Justice Lawrence, of the Supreme Court of New York, action for causing the death of a young child, on a public street.— GENTLEMEN OF THE JURY: I deem it my duty to say to you at the outset, that the jury are not to draw any inference from the fact that the court refused to dismiss the complaint on the motion of the defendant's counsel. The only inference to be drawn from that refusal is that the court was of the opinion that the question of negligence and of contributory negligence in this case should be submitted to the jury, and not taken away from them, and no intimation in regard to the merits of the case, either in favor of the plaintiff or of the defendant, should be drawn, nor was it intended by the court that it should be drawn by its action in regard to the refusal to grant that motion. I ought also say to you that in the determination of the questions of fact involved here, we are not to be governed by our sympathies, nor to allow those sympathies to influence judgment. The accident, of course, is a very deplorable one, and there is no amount of money which can compensate the parents of this child for the injury which they have sustained; but before they can ask another citizen to solace their affliction, by giving them a pecuniary compensation, it is necessary for them to bring themselves within the rules of law applicable to such cases, by their evidence before the jury, and unless they succeed in doing so they must fail in obtaining a verdict. You know, gentlemen of the jury, as you have been sitting here for parts of two weeks, that a great many cases have been tried in this room during that time involving the question of negligence, and to some of you, what I am about to say will necessarily be a repetition of what I have said to you in other cases. The law is perfectly well settled that to entitle a plaintiff to successfully maintain an action of this character it is necessary for the plaintiff, by a preponderance of evidence, to establish, first, the proposition that the injury which is complained of, and which resulted in the death of this young

child, was the result of the negligence of the servant of the defendant, and, also, it is necessary for the plaintiff to show that the child was not guilty of what is called in the law contributory negligence, or of action or conduct which contributed to the production of the injury. This must be done, gentlemen, as I have said, by a preponderance of evidence. On the question of contributory negligence, it is necessary and proper that I should say that the child, even if the child is to be regarded as a child *sui juris*, as it is called in the law, or as it might be roughly translated, capable of taking care of itself in the streets — is chargeable with the exercise only of that degree of prudence which might reasonably be expected under the circumstances of a child of his years.

Now, gentlemen, you have heard the evidence in this case, there have been quite a number of witnesses, but only a few of them, comparatively speaking, saw the accident. The father, who was the first witness examined on the part of the plaintiff, did not see the accident; Mr. Kahrs, who testified that the horses were running as fast as heavy horses could run, did not see the accident; Mr. Keegan, who testified that there were 300 or 400, or lots of children, as he expressed it, thought that the pole struck the boy; Mr. Meyers did not actually see the accident; he said there were a good many children in the street; Koch, the boy who saw the accident, said that the horses were running at full speed; Boyle said about the same thing. Mr. Bingham, the letter carrier, however, testified that the driver pulled up to let another truck pass; he testified that the speed of the horses, substantially, was not excessive, and all that he said on the subject of contributory negligence, or of negligence further than that, as I recollect it, was that the driver could have seen the boy if he had looked; that this was a tenement-house district, and full of children. The witness, Baker, was called as to the stenographic notes taken at the coroner's inquest, and he testified to alleged contradictions between the testimony of the boy, Boyle, as rendered yesterday and the testimony of the boy as rendered there. Mrs. Mac Reynolds, on the other hand, on the part of the defendant, says that the boy ran right under the horses' feet. She was the woman who picked up the child. Eichler says the same thing. Gentlemen of the jury, it is for you to pass upon the credibility of these witnesses. As I have already said to you, it is not for you to give a verdict in favor of this

plaintiff because you sympathize with the parents who have been bereaved by this accident. You must be satisfied that the weight of the evidence is that the driver could have avoided this accident by the exercise of prudence and of care, and that the boy could not have avoided being hurt by the exercise of that prudence and degree of care which you would look for from a bright, intelligent boy of about eight years of age, before you can render a verdict for the plaintiff. If you are not satisfied that the plaintiff has succeeded in establishing that the accident did occur through the negligence of the defendant, and that the boy's conduct did not contribute to the accident, it is your duty to render a verdict in favor of the defendant. If, on the whole case, however, you think that the driver could have avoided this accident, and that the boy, acting in the way in which he did, could not have avoided being run over or stricken down by the pole or by the horses, whichever it may have been, then you may render a verdict in favor of the plaintiff, and, should you do so, you are entitled to render such verdict as in your judgment will satisfy or compensate for the pecuniary loss which the parents and next of kin have sustained by the death of the boy.

As I have said before, I necessarily have to repeat myself, and I will, therefore, repeat what many of you heard me say yesterday, or may have heard me say the day before, that, because I have spoken upon the question of damages, you are not to understand the court as intimating any opinion that the plaintiff is entitled to recover any damages whatever. It is my duty to state to you the rule as to damages, as I understand it, in case you should adopt the plaintiff's view, and believe that negligence has been established; and want of contributory negligence has been established, but unless you find those facts, however much you may deplore this accident, and however much you may sympathize with the parents of the boy, and next of kin, it is your duty on your oaths to render a verdict in favor of the defendant.

Your Honor has charged in substance that if the child is *sui juris* he is charged with the exercise only of that degree of care that may reasonably be expected of a child of his years. I request you to charge the jury that what is to be regarded as a reasonable degree of care to be expected of a child of his years is a matter of law.

The Court: I refuse so to charge, on the authority of *Stone against The Dry Dock and East Broadway Railroad Co.*, 115 N. Y., page 110.

§ 444. Charge by Mr. Justice Dixon, of the Supreme Court of New Jersey, action by husband and wife, for injuries to the wife, caused while riding on an electric car.— GENTLEMEN OF THE JURY: It appears in this case that on the 11th day of May last, the plaintiff became a passenger upon a car of the Bergen County Traction Co., to ride out to Englewood, and that when going through Leonia, the car went rapidly down the Leonia hill, and at the curve at the bottom of the hill jumped the track, and ran for some distance afterwards, giving the plaintiff something of a shaking up, and this suit is brought to recover compensation for the injuries resulting to her from that occurrence.

The responsibility of the defendant is admitted by its counsel, and, therefore, your verdict in this case must be for the plaintiff, for nominal damages at least, and for what else you may think she is entitled to have as compensation for whatever substantial injury she received.

The claim on behalf of the plaintiffs is that as a result of that accident concussion of the spinal cord, resulting in congestion, was produced, and that out of that congestion of the spinal cord have sprung the various troubles from which it is claimed she is now suffering,— nervous weakness, something of hysteria, pains in the limbs and in the back, numbness, a tendency to fainting; and not only these present conditions, but a prospect of their continuance, and probabilities of their increasing.

The burden, of course, rests on the plaintiff to satisfy you that the illnesses of which she now complains are the result of that occurrence; only to the extent that she does satisfy you that they result from that will they be taken into consideration by you in this case.

The defendant insists that her present complaints did not spring from that accident; that the cause of them, or at least the symptoms of them, and, therefore, probably the cause, existed before the accident. If it be true that those symptoms existed before the accident, yet if you are satisfied that this accident further increased the trouble in its intensity, or caused its longer continuance, then she would be entitled to compensation for that increase of the duration or the intensity of them.

The defendant further contends that her present troubles, if they did not spring from a cause existing before the accident, sprung from a fall which she had in the following July, when

riding upon a bicycle. So far as you believe from the evidence that that accident is the cause of her present condition you will leave her present condition out of view. She is only to have compensation for the results of the accident that occurred in the trolley car. But whether they be either an original cause or an aggravation of her trouble, she would be still entitled to compensation therefor.

Since that accident she has married. As a result of the marriage, of course, there has devolved upon her husband the duty of bearing the expenses of her cure; but in testifying in this case, in response to the inquiry as to who was to pay Doctor Lansing, she said that she was to pay Doctor Lansing; and, notwithstanding the fact that her husband, as husband, may be under a legal obligation to pay for her cure, yet she has the power of herself contracting with a physician for his attendance, and if you believe from what she said that in this particular case she has incurred indebtedness to Doctor Lansing for his attendance upon her as a physician, — if you believe her to be under a personal obligation because of her personal bargain, you have a right to take into consideration that fact as well.

Those are the matters, gentlemen, for which the plaintiff will be entitled to recover in this suit, so far as the evidence warrants it.

§ 445. Charge by Mr. Justice Lippincott, of the Supreme Court of New Jersey, action by a postal agent.— GENTLEMEN OF THE JURY: In this case if the plaintiff was treated as an employe of the defendant, the railroad company, there could be no recovery. In this case it is clear that the injuries inflicted upon the plaintiff were the result of the negligence of an employe of the defendant, of a person standing in the relation of a servant to the railroad company. It appears clearly here that the accident in which the plaintiff was injured was caused by the neglect of what is known as the tower man in allowing a freight train to go into and upon the track on which there was an engine crossing to another track. It may have been the fault of the engineer in charge of the engine on the freight train. This engine appears to have been a runaway engine. This state of facts would require the court to apply the principle that one employe cannot recover of the defendant for injuries caused by the negligence of a co-employe. If this be not so then the cause of the accident is un-

known. It was in this case either an unavoidable accident, or one the cause of which the plaintiff has not proved. Therefore with nothing but the occurrence of the accident to stand on there could be no recovery. I take it, it is well established that no presumption of negligence arises by reason of an accident or injury in a case of this kind. Negligence must affirmatively be proved. This accident and injury occurred in Philadelphia. The plaintiff was a postal agent or mail clerk on one of the mail trains of the Pennsylvania Railway, being run between New York and Washington. In Pennsylvania he is treated as an employe of the railroad, by virtue of the provisions of the first section of an act of that State, entitled, "An act relating to railroad companies and common carriers, defining their liabilities and authorizing them to provide means of indemnity against loss of life and personal injury." It is provided that "when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the road, works, depots and premises of a railroad company, or on or about any cars therein or thereon, of which such company such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe; provided, that this section shall not apply to passengers."

Now, it is conceded that by the United States statute the engagement of the railroad company to carry the mails for a compensation includes the transportation of the mail agent of the United States without extra charge, and, therefore, it would appear, logically speaking, that the compensation for the carriage of the mail agent being provided for, the relation of the mail agent was that of a passenger to the company, but the Supreme Court of the State of Pennsylvania had held otherwise. In the case of *The Pennsylvania Railroad Company v. Price*, it was distinctly held that the route mail agent in the employ of the United States Post-Office Department while travelling on a railroad in the State of Pennsylvania in the performance of his duty was not a passenger within the meaning of this act. This case was before the Supreme Court of the United States on writ of error, and was dismissed because no question of Federal authority was involved. The court in its opinion, delivered by Justice Miller, cites the provision of the United States statute which required that every railway carrying the mail shall carry it on any train which runs over its route, without extra charge, that is all

mailable matter, and the person in charge of the same. After citing this provision, the court said: "We do not think these provisions either aid or govern the provision in the Pennsylvania statute." And the court further declares that "the person thus to be carried is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge." Nor does the fact that he is in the employment of the United States affect the question. It would be just the same as if the company had contracted with any other person who had charge of the freight on the car without additional compensation.

Now, this court feels, with this decision before it, that this case should be disposed of in favor of the defendant, were it not for some other considerations which have been presented in this case. Generally speaking, the court here would be bound by the construction of the statute in another State governing the courts of that State, in an action involving the construction of the statute and its effect. But counsel for plaintiff contends, first, that in States where there is no such statute, and generally speaking, the rule is that the mail clerk engaged in the performance of his duty on a mail railway train for which compensation is provided, is to be treated in law as a passenger, citing the case in the New York Court of Appeals, *Seybolt v. New York, Lake Erie and Western Railroad Company*, and the case of *Smith v. Nashville Railroad Company* in the Federal Reports; also reference is made to cases in Pennsylvania, and the general principle is that a mail clerk or postal agent is carried for hire. It is contended that the force of this Pennsylvania statute is confined to railroads wholly within that State, and actions instituted in the courts of that State; that in the absence of the statute, generally speaking, mail clerks must be treated as passengers with a contract with the railroad company, for safe passage with the exercise of that degree of care required of railroad companies in the safe carriage of their passengers, and that the statute of Pennsylvania being a limitation of that contract, is contrary to the policy of this State and cannot be enforced in our courts.

Now, for the purposes of this case at Circuit I shall adopt this view. The contract between the railroad company and the plaintiff is one of a passenger and a common carrier, and they were bound to the care required by law between passengers and

common carriers, and this relation ran not only in the passage through this State, but through the State of Pennsylvania and other States, and that the statute of Pennsylvania does not limit or restrict the liabilities of the defendant company upon such contract, nor can a contrary principle be applied to defeat actions commenced in the courts of the State of New Jersey.

This statute, the effect of it in Pennsylvania, is by the defendant conceded to be the only defense set up to this action, and, therefore, it leaves the only question in this case to be determined by the jury one of damages. What I have said on this matter of law is for the purpose of informing counsel of the view which the court takes of the law in holding this case for the jury. The question is one of considerable importance, and perhaps some difficulty.

Now, gentlemen of the jury, the only question which the court intends to submit to you is the one question of how much damage shall be awarded against the defendant to the plaintiff for the injuries which he received in this accident in the city of Philadelphia. Now, in this case, you start out with the proposition clearly established that the action is not one against the defendant railroad company for any intentional injury, it is injury which has arisen to the plaintiff by some inadvertence or some neglect of the servants of the defendant railroad company. It was not a willful injury, and, therefore, you are not to award in this case any exemplary or punitive damages, no damages for smart money, no damages to punish the railroad company, nor for example's sake. You are confined, in ascertaining damages, to the principle that you make compensation, so far as money can make compensation, to the plaintiff for the injuries received by him. You confine yourselves strictly to the principle of compensation in ascertaining the amount which should be awarded to him. You are to give him compensation, no more, no less. You have a right to regard the expenses which he has been put to for physician's bills, for medicines, and healing. As I understand the evidence, there is no proof which will allow you to regard any expense incurred by him for medicine, because he has not suggested it in proof to any degree of certainty which would give you the right to estimate it. You have the right to consider his physician's attendance, and upon that you have the evidence of the physician. You have the right to consider the pain he has undergone from the time of the acci-

dent to the present, and that which he will probably and reasonably, under the evidence, undergo in the future. The consideration of this element, and the conclusions to be reached by you upon that consideration, are matters of a good deal of uncertainty. How can you place a value upon pain and suffering? The only thing a jury can do is to say, you have a right to regard it, a right to place damages upon that element, regard that element in arriving at damages, but do it with great care and circumspection and with good judgment. You can give him compensation for the pain and suffering; but give him no more than compensation. You have a right also to regard and consider whether this accident will probably in the future affect his earning capacity. His earning capacity in the past, up to the present, need not be regarded by you, because his earning capacity has not been diminished, his compensation has been paid up to the present time. But you have evidence here before you as to his physical and mental condition, and you have a right to ask yourselves and consider the question how far his injuries received in the accident may diminish his earning capacity in the future. Will it probably prevent him, either wholly or partially, from carrying on the business he is now in, or any other business, to earn money for himself and family? If, in the judgment of the jury, it will probably affect his earning capacity, diminish it, you regard that element, and you have a right to consider how much money he will probably lose by reason of any diminution of his earning capacity. How far the accident may affect his physical health and strength, and his mental health and strength, can be regarded by you; these are elements of damage in this case which you are to consider. On the proof it is a matter for you to expend your very best judgment upon. Avoid extravagance, avoid mere conjecture; in this matter use your very best judgment and award simply compensation to the plaintiff for his injuries.

§ 446. Charge by Mr. Justice Dixon, of the Supreme Court of New Jersey, action for injuries caused to the plaintiff, while alighting from a car of a street railroad.— GENTLEMEN OF THE JURY: I suppose by this time you have become about as familiar with the rules of law that control cases of this sort as either counsel or court. They have been repeated so often in your hearing this term, either directly to you or to your associate jurors on

other cases. They are simply that the plaintiff must prove to the satisfaction of the jury that some employe of the defendant corporation has failed to exercise reasonable care in the discharge of his duties, and that out of that failure has sprung the injury of the plaintiff, and the jury must not believe that the plaintiff himself, by the lack of reasonable care on his part, has contributed to the injury. You must have affirmative proof of the defendant's negligence, and as to plaintiff's negligence you assume that he was careful in the absence of evidence to the contrary.

Now, of course, this proof of negligence on the part of the defendant must be produced by a preponderance of evidence, more evidence of the defendant's carelessness than to the contrary. In this case there seems to be but one point upon which it is possible to charge the defendant with negligence, and that is this, that the conductor gave the signal to the motorman to set his car in motion after the passengers had a right to assume that he was going to stop, and because of that signal there was a forward motion given to the car which threw Mr. Steele off the step. It seems to be admitted on all sides that the conductor had received notice from his passengers that he should stop at that crossing; the lady passengers both say that he had notice that he was to stop, and Mr. Steele says the conductor had notice from him that he should stop, and the motorman, Mr. Haines, said that he had received from the conductor the bell to indicate that he was to stop, so that on all hands it is agreed that the car was to come to a stop in order to discharge passengers at that point. Now, under those circumstances, it was the duty, of course, of Mr. Steele not to get off until the car had come to a stop. If he intentionally got off before the car came to a stop and thereby fell, why that was his misfortune and it was no negligence on the part of the company if it resulted in that accident under those circumstances, and, I say, the only ground on which negligence can be imputed to the company is that in such condition of things the car made a forward motion which unexpectedly threw Mr. Steele from his position. Now, that fact the plaintiff must prove by a fair preponderance of evidence. What is the evidence on the subject? You have the testimony of the first witness, Mr. Beers, who, I think, testifies that he noticed that the car gave a forward motion while Mr. Steele was standing on the step,

and my recollection of the evidence is that there is no other proof to that effect. Mr. Steele himself hardly testifies to it; he remembers that he was thrown off in some way, and after that he recollects nothing; scarcely remembers anything, he says, until next morning. He had forgotten that he was picked up; had forgotten that he, himself, asked some questions; and it is not unusual, under circumstances of that sort, that memory fails, and it seems to have done so with him. Then, you have the motorman, who distinctly testifies that he received no signal to go ahead, and he didn't attempt to go ahead, and that his car was gradually coming to a stop, and had almost reached a stop, when he heard this cry from the conductor behind, which drew his attention to the fact that Mr. Steele had fallen. You have the testimony of the two ladies to the same effect, that the car was gradually coming to a stop. Mr. Greene heard the two bells of the motorman. They may have been the signal which the motorman gives to the conductor to indicate to him that the track is clear, and those two bells did indicate that the track was clear. On giving those two bells the motorman waits until he receives the two bells overhead from the conductor before he proceeds forward. Mr. Greene heard the two bells of the motorman, but didn't see whether the car moved ahead or not. Now, this is the evidence, and does it form a fair preponderance of proof that the car made a sudden motion forward, which threw the plaintiff off the step? If it does, why, then, you may find in favor of the plaintiff, subject to what I shall presently say to you. If it does not, why, of course, then your verdict must be for the defendant. If you think that the car made a sudden motion forward and thereby threw Mr. Steele off, then you ask this question: Whether Mr. Steele, under all the circumstances, was guilty of negligence in going out upon the step, in the position which he took, before the car had actually come to a stop. In answering that question, of course, you remember that he is an old man, seventy years of age; you remember that he had a basket in his hand, or on his arm, as one of the witnesses says, and then he tells you that, although he was on the left side of the car, yet he had hold of the rail, or handle, or whatever it was, with his left hand; so that, to some extent, it would appear that his back, or at least his side, was towards the forward motion of the car. If you picture to your mind his position you will see that it was rather an awkward

one for him to assume, and you will say whether it was an exercise of reasonable care on his part to assume that position under all circumstances of the case. If you think that he did not exercise reasonable care in doing that, then he would not be entitled to your verdict; even though he was thrown by the forward motion of the car he would not be entitled to recover because it was negligence of both parties, and when that occurs the plaintiff fails. If the verdict is for the defendant, say so; if for the plaintiff, you must give him what you think is a fair compensation for the injuries that he has received, and you can take into consideration his age as one of the circumstances to be dealt with.

§ 447. Charge by Mr. Justice Dickey, of the Supreme Court of New York, action for injuries received while crossing the tracks of a steam railroad.—GENTLEMEN: The claim of the plaintiff in this action is that on the day of the accident in question he was going to the depot of this defendant to take a train to go to his night work at a place near by — Perth Amboy — and that in so doing he crossed the defendant railroad company's track at a place where people were accustomed to cross to and fro without any hindrance or interference. It is also claimed that while it was not one of the public roads of that place, still it was a roadway to the extent that persons were permitted to cross it by the railroad company, because they had been accustomed to cross at that point for a number of years without interference. Now, if you believe that the public for several years had been in the habit of crossing the railroad at this point, the acquiescence of the defendant in the public use amounted to a license or permission to cross at that point, and imposed the duty upon it as to all persons so crossing to exercise reasonable care in the movements of its trains, so as to protect them from injury. Although not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train approaching such a crossing, the company is bound to give some notice or warning, and as to what is sufficient is a question for you. Therefore, in determining this case on the question of the negligence of the defendant, which is one of the issues in the case, and I may say in passing that the plaintiff has the affirmative of that as well as the other issue, his own freedom from negligence that in anywise contributed to his hurt, it is important for you to determine whether or not as this train

went by that crossing which the plaintiff claims was the scene of the accident, any bell was rung, or any whistle blown, because if you find that they gave the ordinary, accustomed and what you might say was the proper signal of their approach to that crossing, why it may well be that the defendant was free from all negligence, or that the plaintiff has not proved any negligence on the part of the defendant. The plaintiff says, practically, that no notice was given of any kind; that the train came on swiftly; that no whistle was blown, and no bell was rung at the crossing until just at the point of contact. Some of the people on the train and the bystanders testify to the contrary. It is for you to determine by the weight of evidence to whom you will give the credence. If you find that the proper notice was given, as I have said, then it would be hard, indeed, for you to find that the defendant was guilty of negligence; but if you find that no notice whatever was given, that the accident happened at this point of the crossing, as the plaintiff and his witnesses claim, and that the defendant neglected some duty it owed to the plaintiff in that regard by failing to give him any notice, then you will pass to the next question in the case, and in that the plaintiff has the affirmative of the issue and must, by the preponderance and weight of evidence, satisfy you that he himself was free from all negligence that in anywise contributed to the injury, because, no matter how negligent the defendant, the railroad company, was, if he was negligent in the slightest degree that in anywise contributed to the injury, there can be no recovery.

Now, if the testimony of the defendant is true that the plaintiff was walking on the track there, not at the crossing, but at a point beyond it, walking down the track, why that is clearly negligence in law that would prevent any recovery, and the verdict must be for the defendant. Of course, the plaintiff entirely disputes that. The version of the occurrence given by the various witnesses differs materially. One locates it at one place, just at the crossing itself, while another puts it down the railroad track, some distance from it.

Now, on the question of contributory negligence, it was the duty of the defendant in approaching a point of danger to do so with care and caution commensurate with the locality there. The duty of looking and listening when approaching crossings is not adequately discharged by merely looking as a dangerous point is approached, and, when it is reached, going blindly for-

ward. If you believe the plaintiff saw the approaching train, or if he had looked he would have necessarily seen the train in time to avoid it, and still went on the track in the danger, this was negligent; there can be no recovery. The plaintiff must bring into requisition all the faculties with which he is endowed to protect himself against injury. He must listen as well as look. He must have acted as an ordinary, prudent man would have acted under the circumstances.

Now, as to determining these two questions: First, was the defendant negligent on this night in question? If it was, does the plaintiff satisfy you, by the weight of evidence, that he was free from all negligence that contributed to his hurt? If you find both of these propositions by the weight of evidence in favor of the plaintiff, then you will proceed to the question of damages, but otherwise not. If you find either of these propositions against him, you should not consider the question of damages at all; but, as I say, if you find both in his favor, then you will determine what the defendant ought to give him by way of damages to make him whole for the injuries he suffered upon that occasion. Now, you have been told he is a man thirty-two years old; that he was in the hospital eight months; that as the result of this accident he lost his good right leg, and that he is hurt in his hip. In fixing the value of the compensation to be given to the plaintiff, if you reach that question at all, give him such damages as, in your good sense and sound discretion, you determine will make him whole for the injuries he has sustained, and when you do that do not go any further.

In the determination of this case on its merits as to whether or not you will give any verdict, or if you do give a verdict as to the extent or amount of it, do not be guided by sympathy at all. It is a hard case, as all these cases are. The mere happening of the accident itself gives the plaintiff no right of action. It may be a popular notion that anybody hurt by a railroad anywhere, anyhow and at any time must necessarily recover some damages. That is a fallacy, and if you have any such notion disabuse your minds entirely of it. You can give this plaintiff a verdict only provided, under the law as I have laid it down to you, you find both of these propositions in his favor, and if you do, then on the question of damages give him only such damages, and stop at that, as necessarily flow from the hurt he has received.

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